Carnegie Endowment for International Peace

DIVISION OF INTERNATIONAL LAW

Pamphlet No. 26

OPINIONS OF ATTORNEYS GENERAL, DECISIONS OF FEDERAL COURTS, AND DIPLOMATIC CORRESPONDENCE RESPECTING THE TREATIES OF 1785, 1799 AND 1828 BETWEEN THE UNITED STATES AND PRUSSIA.

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Prefatory Note

On January 31, 1917, the German government informed the United States that

> "from February 1, 1917, all sea traffic will be stopped with every available weapon and without further notice in the following blockade zones [describing them in detail] around Great Britain France, Italy and in the Eastern Mediterranean."

On the third day of February, the President of the United States addressed both Houses of Congress in joint session, and, after stating in detail the relations between Germany and the United States and the apparent intention on the part of the German government to deprive the United States of the rights which neutrals possessed upon the high seas, he informed the Congress that he had

> "directed the Secretary of State to announce to His Excellency the German Ambassador that all diplomatic relations between the United States and the German Empire are severed, and that the American Ambassador at Berlin will immediately be withdrawn; and, in accordance with this decision, to hand to His Excellency his passports."

The passports were accordingly handed to His Excellency the German Ambassador the same day, and diplomatic relations between the two countries were thus severed.

There are three treaties which in whole or in part in the opinion of the German Empire and of the United States affect their international relations. The treaties in question are: First, the treaty of amity and commerce concluded between Prussia and the United States of America on September 10, 1785; second, the treaty of amity and commerce concluded between Prussia and the United States of America on July 11, 1799; and, third, the treaty of commerce and navigation concluded between Prussia and the United States of America on May 1, 1828.

These treaties have been held by the governments of the contracting parties to apply not only to Prussia, but to the North German Confederation, of which Prussia was the leading member, and also to the

German Empire, of which the King of Prussia is the German Emperor.

The opinions of the Attorneys General of the United States, the decisions of Federal Courts and the correspondence between the German Empire on the one hand and the United States on the other, relating to the nature and binding effect of the treaties are here collected from official sources and issued in the present pamphlet. Although some parts of the subject-matter in these opinions, decisions and correspondence may not seem to be strictly necessary to the purposes of this pamphlet, it has been deemed advisable to print them in full and not to take any liberties with the original texts.

JAMES BROWN SCOTT,
Director of the Division of International Law

WASHINGTON, D. C.,
February 28, 1917.

Contents

OPINIONS OF ATTORNEYS GENERAL, DECISIONS OF FEDERAL COURTS AND DIPLOMATIC CORRESPONDENCE RESPECTING THE TREATIES OF 1785, 1799 AND 1828 BETWEEN THE UNITED STATES AND PRUSSIA.

Texts of Treaties between the United States and Prussia

TREATY OF 1785[1]

Concluded September 10, 1785; Ratified by the Congress May 17, 1786; Ratifications Exchanged October, 1786

His Majesty the King of Prussia and the United States of America, desiring to fix, in a permanent and equitable manner, the rules to be observed in the intercourse and commerce they desire to establish between their respective countries. His Majesty and the United States have judged that the said end cannot be better obtained than by taking the most perfect equality and reciprocity for the basis of their agreement.

With this view, His Majesty the King of Prussia has nominated and constituted as his Plenipotentiary, the Baron Frederick William de Thulemeier, his Privy Counsellor of Embassy, and Envoy Extraordinary with their High Mightinesses the States-General of the United Netherlands; and the United States have, on their part, given full powers to John Adams, Esquire, late one of their Ministers Plenipotentiary for negotiating a peace, heretofore a Delegate in Congress from the State of Massachusetts, and Chief Justice of the same, and now Minister Plenipotentiary of the United States with His Britannic Majesty; Doctor Benjamin Franklin, late Minister Plenipotentiary at the Court of Versailles, and another of their Ministers Plenipotentiary for negotiating a peace; and Thomas Jefferson, heretofore a Delegate in Congress from the State of Virginia, and Governor of the said State, and now Minister Plenipotentiary of the United States at the

[1]8 Stat. L. 378; Malloy's *Treaties*, etc., Vol. 2, p. 1477.

NOTE: This treaty expired by its own limitations October, 1796, but Article XII was revived by Article XII of the treaty of 1828.

Court of His Most Christian Majesty; which respective Plenipotentiaries, after having exchanged their full powers, and on mature deliberation, have concluded, settled, and signed the following articles:

Article I

There shall be a firm, inviolable, and universal peace and sincere friendship between His Majesty the King of Prussia, his heirs, successors, and subjects, on the one part, and the United States of America and their citizens on the other, without exception of persons or places.

Article II

The subjects of His Majesty the King of Prussia may frequent all the coasts and countries of the United States of America, and reside and trade there in all sorts of produce, manufactures, and merchandize; and shall pay within the said United States no other or greater duties, charges, or fees whatsoever, than the most favoured nations are or shall be obliged to pay: and they shall enjoy all the rights, privileges, and exemptions in navigation and commerce which the most favoured nation does or shall enjoy; submitting themselves nevertheless to the laws and usages there established, and to which are submitted the citizens of the United States, and the citizens and subjects of the most favoured nations.

Article III

In like manner the citizens of the United States of America may frequent all the coasts and countries of His Majesty the King of Prussia, and reside and trade there in all sorts of produce, manufactures, and merchandize; and shall pay in the dominions of his said Majesty no other or greater duties, charges, or fees whatsoever than the most favoured nation is or shall be obliged to pay: and they shall enjoy all the rights, privileges, and exemptions in navigation and commerce which the most favoured nation does or shall enjoy; submitting themselves nevertheless to the laws and usages there established, and to which are submitted the subjects of His Majesty the King of Prussia, and the subjects and citizens of the most favoured nations.

Article IV

More especially each party shall have a right to carry their own produce, manufactures, and merchandize in their own or any other vessels to any parts of the dominions of the other, where it shall be

lawful for all the subjects or citizens of that other freely to purchase them; and thence to take the produce, manufactures, and merchandize of the other, which all the said citizens or subjects shall in like manner be free to sell them, paying in both cases such duties, charges, and fees only as are or shall be paid by the most favoured nation. Nevertheless, the King of Prussia and the United States, and each of them, reserve to themselves the right, where any nation restrains the transportation of merchandise to the vessels of the country of which it is the growth or manufacture, to establish against such nations retaliating regulations; and also the right to prohibit, in their respective countries, the importation and exportation of all merchandise whatsoever, when reasons of state shall require it. In this case, the subjects or citizens of either of the contracting parties shall not import nor export the merchandise prohibited by the other; but if one of the contracting parties permits any other nation to import or export the same merchandize, the citizens or subjects of the other shall immediately enjoy the same liberty.

Article V

The merchants, commanders of vessels, or other subjects or citizens of either party, shall not within the ports of jurisdiction of the other be forced to unload any sort of merchandize into any other vessels, nor to receive them into their own, nor to wait for their being loaded longer than they please.

Article VI

That the vessels of either party loading within the ports or jurisdiction of the other may not be uselessly harassed or detained, it is agreed that all examinations of goods required by the laws shall be made before they are laden on board the vessel, and that there shall be no examination after; nor shall the vesssel be searched at any time, unless articles shall have been laden therein clandestinely and illegally, in which case the person by whose order they were carried on board, or who carried them without order, shall be liable to the laws of the land in which he is; but no other person shall be molested, nor shall any other goods, nor the vessel, be seized or detained for that cause.

Article VII

Each party shall endeavor, by all the means of their power, to protect and *desend* [defend] all vessels and other effects belonging to the

citizens or subjects of the other, which shall be within the extent of their jurisdiction, by sea or by land; and shall use all their efforts to recover, and cause to be restored to the right owners, their vessels and effects which shall be taken from them within the extent of their said jurisdiction.

Article VIII

The vessels of the subjects or citizens of either party, coming on any coast belonging to the other, but not willing to enter into port, or being entered into port, and not willing to unload their cargoes or break bulk, shall have liberty to depart and to pursue their voyage without molestation, and without being obliged to render account of their cargo, or to pay any duties, charges, or fees whatsoever, except those established for vessels entered into port, and appropriated to the maintenance of the port itself, or of other establishments for the safety and convenience of navigators, which duties, charges, and fees shall be the same, and shall be paid on the same footing as in the case of subjects or citizens of the country where they are established.

Article IX

When any vessel of either party shall be wrecked, foundered, or otherwise damaged on the coasts, or within the dominion of the other, their respective subjects or citizens shall receive, as well for themselves as for their vessels and effects, the same assistance which would be due to the inhabitants of the country where the damage happens, and shall pay the same charges and dues only as the said inhabitants would be subject to pay in a like case; and if the operations of repair shall require that the whole or any part of their cargo be unladed, they shall pay no duties, charges, or fees on the part which they shall relade and carry away. The ancient and barbarous right to wrecks of the sea shall be entirely abolished, with respect to the subjects and citizens of the two contracting parties.

Article X

The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation, or otherwise; and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods, whether by testament or ab intestato, and may take possession thereof either by themselves or by others acting for them, and dispose of the

same at their will, paying such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the representative, such care shall be taken of the said goods, and for so long a time as would be taken of the goods of a native in like case, until the lawful owner may take measures for receiving them. And if question shall arise among several claimants to which of them the said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. And where, on the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, such subject shall be allowed a reasonable time to sell the same, and to withdraw the proce[e]ds without molestation, and exempt from all rights of detraction on the part of the Government of the respective States. But this article shall not derogate in any manner from the force of the laws already published or hereafter to be published, by His Majesty the King of Prussia, to prevent the emigration of his subjects.

ARTICLE XI

The most perfect freedom of conscience and of worship is granted to the citizens or subjects of either party within the jurisdiction of the other, without being liable to molestation in that respect for any cause other than an insult on the religion of others. Moreover, when the subjects or citizens of the one party shall die within the jurisdiction of the other, their bodies shall be buried in the usual burying-grounds or other decent and suitable places, and shall be protected from violation or disturbance.

ARTICLE XII [1]

If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vesssel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall

[1] Revived by treaty of 1828.

be extended to persons who shall be on board a free vesssel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy.

Article XIII

And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting the merchandize heretofore called contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of one of the parties to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors: And it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed, of a vessel stopped for articles heretofore deemed contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

Article XIV

And in the same case where one of the parties is engaged in war with another Power, that the vessels of the neutral party may be readily and certainly known, it is agreed that they shall be provided with sea-letters or passports, which shall express the name, the property, and burthen of the vessel, as also the name and dwelling of the master; which passports shall be made out in good and due forms (to be settled by conventions between the parties whenever occasion shall require), shall be renewed as often as the vessel shall return into port, and shall be exhibited whensoever required, as well in the open sea as in port. But if the said vessel be under convoy of one or more vessels of war belonging to the neutral party, the simple declaration of the

officer commanding the convoy, that the said vessel belongs to the party of which he is, shall be considered as establishing the fact, and shall relieve both parties from the trouble of further examination.

Article XV

And to prevent entirely all disorder and violence in such cases, it is stipulated, that when the vessels of the neutral party, sailing without convoy, shall be met by any vessel of war, public or private, of the other party, such vessel of war shall not approach within cannon-shot of the said neutral vessel, nor send more than two or three men in their boat on board the same, to examine her sea-letters or passports. And all persons belonging to any vessel of war, public or private, who shall molest or injure in any manner whatever the people, vessels, or effects of the other party, shall be responsible in their persons and property for damages and interest, sufficient security for which shall be given by all commanders of private armed vessels before they are commissioned.

Article XVI

It is agreed that the subjects or citizens of each of the contracting parties, their vessels and effects, shall not be liable to any embargo or detention on the part of the other, for any military expedition, or other public or private purpose whatsoever. And in all cases of seizure, detention, or arrests for debts contracted or offences committed by any citizen or subject of the one party, within the jurisdiction of the other, the same shall be made and prosecuted by order and authority of law only, and according to the regular course of proceedings usual in such cases.

Article XVII

If any vessel or effects of the neutral Power be taken by an enemy of the other, or by a pirate, and retaken by that other, they shall be brought into some port of one of the parties, and delivered into the custody of the officers of that port, in order to be restored entire to the true proprietor, as soon as due proof shall be made concerning the property thereof.

Article XVIII

If the citizens or subjects of either party, in danger from tempests, pirates, enemies, or other accident, shall take refuge with their vessels

or effects, within the harbours or jurisdiction of the other, they shall be received, protected, and treated with humanity and kindness, and shall be permitted to furnish themselves, at reasonable prices, with all refreshments, provisions, and other things necessary for their sustenance, hea[l]th, and accommodation, and for the repair of their vessels.

Article XIX

The vessels of war, public and private, of both parties, shall carry freely wheresoever they please the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to shew. But no vessel which shall have made prises on the subjects of His Most Christian Majesty the King of France shall have a right of asylum in the ports or havens of the said United States; and if any such be forced therein by tempest or dangers of the sea, they shall be obliged to depart as soon as possible, according to the tenor of the treaties existing between his said Most Christian Majesty and the said United States.

Article XX

No citizen or subject of either of the contracting parties shall take from any Power with which the other may be at war any commission or letter of marque for arming any vessel to act as a privateer against the other, on pain of being punished as a pirate; nor shall either party hire, lend, or give any part of their naval or military force to the enemy of the other, to aid them offensively or defensively against that other.

Article XXI

If the two contracting parties should be engaged in war against a common enemy, the following points shall be observed between them:

1. If a vessel of one of the parties retaken by a privateer of the other shall not have been in possession of the enemy more than twenty-four hours, she shall be restored to the first owner for one-third of

the value of the vessel and cargo; but if she shall have been more than twenty-four hours in possession of the enemy, she shall belong wholly to the recaptor.

2. If in the same case the recapture were by a public vessel of war of the one party, restitution shall be made to the owner for one-thirtieth part of the value of the vessel and cargo, if she shall not have been in possession of the enemy more than twenty-four hours and one-tenth of the said value where she shall have been longer; which sums shall be distributed in gratuities to the recaptors.

3. The restitution in the cases aforesaid shall be after due proof of property, and surety given for the part to which the recaptors are entitled.

4. The vessels of war, public and private, of the two parties, shall be reciprocally admitted with their prizes into the respective ports of each: but the said prizes shall not be discharged nor sold there, until their legality shall have been decided, according to the laws and regulations of States to which the captor belongs, but by the judicatures of the place into which the prize shall have been conducted.

5. It shall be free to each party to make such regulations as they shall judge necessary for the conduct of their respective vessels of war, public and private, relative to the vessels which they shall take and carry into the ports of the two parties.

Article XXII

Where the parties shall have a common enemy, or shall both be neutral, the vessels of war of each shall upon all occasions take under their protection the vessels of the other going the same course, and shall defend such vessels as long as they hold the same course against all force and violence, in the same manner as they ought to protect and defend vessels belonging to the party of which they are.

Article XXIII

If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs and may depart freely, carrying off all their effects without molestation or hindrance. And all women and children, scholars of every faculty, cultivators of the earth, artizans, manufacturers, and fishermen, un-

armed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power by the events of war they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price. And all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to be obtained, and *and* more general, shall be allowed to pass free and unmolested; and neither of the contracting Powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce.

Article XXIV

And to prevent the destruction of prisoners of war, by sending them into distant and inclement countries, or by cro*u*ding them into close and noxio*u*s places, the two contracting parties solemnly pledge themselves to each other and to the world that they will not adopt any such practice; that neither will send the prisoners whom they may take from the other into the East Indies, or any other parts of Asia or Africa, but that they shall be placed in some part of their dominions in Europe or America, in wholesome situations; that they shall not be confined in dungeons, prison-ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs; that the officers shall be enlarged on their paroles within convenient districts, and have comfortable quarters, and the common men be disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomly and good as are provided by the party in whose power they are for their own troops; that the officers shall also be daily furnished by the party in whose power they are with as many rations, and of the same articles and quality as are allowed by them, either in kind or by commutation, to officers of equal rank in their own army; and all others shall be daily furnished by them with such ration as they allow to a common soldier in their own service; the value whereof shall be paid by the other party on a mutual adjustment of accounts for the subsistence of prisoners at the close of the war; and the said accounts

shall not be mingled with or set off against any others, nor the balances due on them be withheld as a satisfaction or reprisal for any other article or for any other cause, real or pretended, whatever; that each party shall be allowed to keep a commissary of prisoners of their own appointment, with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him; but if any officer shall break his parole, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual officer or other prisoner shall forfeit so much of the benefit of this article as provides for his enlargement on parole or cantonment. And it is declared, that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations.

Article XXV

The two contracting parties grant to each other the liberty of having, each in the ports of the other, Consuls, Vice-Consuls, Agents, and Commissaries of their own appointment, whose functions shall be regulated by particular agreement whenever either party shall chuse to make such appointment; but if any such Consuls shall exercise commerce, they shall be submitted to the same laws and usages to which the private individuals of their nation are submitted in the same place.

Article XXVI

If either party shall hereafter grant to any other nation, any particular favour in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the compensation, where such nation does the same.

Article XXVII

His Majesty the King of Prussia and the United States of America agree that this treaty shall be in force during the term of ten years

from the exchange of ratifications; and if the expiration of that term should happen during the course of a war between them, then the articles before provided for the regulation of their conduct during such a war, shall continue in force until the conclusion of the treaty which shall re-establish peace; and that this treaty shall be ratified on both sides, and the ratifications exchanged within one year from the day of its signature.

In testimony whereof the Plenipotentiaries before mentioned, have hereto subscribed their names and affixed their seals, at the places of their respective residence, and at the dates expressed under their several signatures.

[Seal] B. FRANKLIN.
Passy, July 9, 1785.
[Seal] TH: JEFFERSON.
Paris, July 28, 1785.
[Seal] JOHN ADAMS.
London, August 5, 1785.
[Seal] F. G. DE THULEMEIER.
A la Haye le 10 Septembre, 1785.

TREATY OF 1799[1]

Concluded July 11, 1799; Ratification Advised by the Senate, February 18, 1800; Ratified by the President, February 19, 1800; Ratifications Exchanged June 22, 1800; Proclaimed November 4, 1800.

His Majesty the King of Prussia and the United States of America, desiring to maintain upon a stable and permanent footing the connections of good understanding which have hitherto so happily subsisted between their respective States, and for this purpose to renew the treaty of amity and commerce concluded between the two Powers at the Hague the 10th of September, 1785, for the term of ten years, His Prussian Majesty has nominated and constituted as his plenipotentiaries the Count Charles William de Finkenstein, his Minister of State, of War, and of the Cabinet, Knight of the Orders of the Black Eagle and of the Red Eagle, and Commander of that of St. John of Jerusalem, the Baron Philip Charles d'Alvensleben, his Minister of State, of War, and of the Cabinet, Knight of the Orders of the Black Eagle and of the Red Eagle, and of that of St. John of Jerusalem, and the Count

[1] 8 Stat. L. 162; Malloy's *Treaties*, etc., Vol. 2, p. 1486.

Christian Henry Curt de Haugwitz, his Minister of State, of War, and of the Cabinet, Knight of the Orders of the Black Eagle and of the Red Eagle; and the President of the United States has furnished with their full powers John Quincy Adams, a citizen of the United States, and their Minister Plenipotentiary at the Court of His Prussian Majesty; which Plenipotentiaries, after having exchanged their full powers, found in good and due form, have concluded, settled, and signed the following articles:

Article I

There shall be in future, as there has been hitherto, a firm, inviolable, and universal peace and a sincere friendship between His Majesty the King of Prussia, his heirs, successors, and subjects, on the one part, and the United States of America and their citizens on the other, without exception of persons or places.

Article II

The subjects of His Majesty the King of Prussia may frequent all the coasts and countries of the United States of America, and reside and trade there in all sorts of produce, manufactures, and merchandize, and shall pay there no other or greater duties, charges, or fees whatsoever than the most favoured nations are or shall be obliged to pay. They shall also enjoy in navigation and commerce all the rights, privileges, and exemptions which the most favoured nation does or shall enjoy, submitting themselves, nevertheless, to the e[s]tablished laws and usages to which are submitted the citizens of the United States and the most favoured nations.

Article III

In like manner, the citizens of the United States of America may frequent all the coasts and countries of His Majesty the King of Prussia, and reside and trade there in all sorts of produce, manufactures, and merchandize, and shall pay, in the dominions of his said Majesty, no other or greater duties, charges, or fees whatsoever than the most favoured nation is or shall be obliged to pay; and they shall enjoy all the rights, privileges, and exemptions in navigation and commerce which the most favoured nation does or shall enjoy, submitting themselves, nevertheless, to the established laws and usages to which are submitted the subjects of His Majesty the King of Prussia and the subjects and the citizens of the most favoured nations.

Article IV

More especially, each party shall have a right to carry their own produce, manufactures, and merchandize, in their own or any other vessels, to any parts of the dominions of the other, where it shall be lawful for all the subjects and citizens of that other freely to purchase them, and thence to take the produce, manufactures, and merchandize of the other, which all the said citizens or subjects shall in like manner be free to sell to them, paying in both cases such duties, charges, and fees only, as are or shall be paid by the most favoured nation. Nevertheless, His Majesty the King of Prussia and the United States respectively reserve to themselves the right, where any nation restrains the transportation of merchandize to the vessels of the country of which it is the growth or manufacture, to establish against such nation retaliating regulations; and also the right to prohibit in their respective countries the importation and exportation of all merchandize whatsoever, when reasons of state shall require it. In this case the subjects or citizens of either of the contracting parties shall not import or export the merchandize prohibited by the other. But if one of the contracting parties permits any other nation to import or export the same merchandize, the citizens or subjects of the other shall immediately enjoy the same liberty.

Article V

The merchants, commanders of vessels, or other subjects or citizens of either party, shall not, within the ports or jurisdiction of the other, be forced to unload any sort of merchandize into any other vessels nor to receive them into their own, nor to wait for their being loaded longer than they please.

Article VI

That the vessels of either party, loading within the ports or jurisdiction of the other, may not be uselessly harassed, or detained, it is agreed, that all examinations of goods, required by the laws, shall be made before they are laden on board the vessel, and that there shall be no examination after; nor shall the vessel be searched at any time, unless articles shall have been laden therein clandestinely and illegally, in which case the person by whose order they were carried on board, or who carried them without order, shall be liable to the laws of the land in which he is, but no other person shall be molested, nor shall any other goods, nor the vessel, be seized or detained for that cause.

Article VII

Each party shall endeavour by all the means in their power to protect and defend all vessels and other effects, belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land; and shall use all their efforts to recover and cause to be restored to the right owners their vessels and effects, which shall be taken from them within the extent of their said jurisdiction.

Article VIII

The vessels of the subjects or citizens of either party, coming on any coast belonging to the other, but not willing to enter into port, or who entering into port are not willing to unload their cargoes or break bulk, shall have liberty to depart and to pursue their voyage without molestation, and without being obliged to render account of their cargoes, or to pay any duties, charges, or fees whatsoever, except those established for vessels entered into port, and appropriated to the maintenance of the port itself, or of other establishments for the safety and convenience of navigators, which duties, charges, and fees shall be the same, and shall be paid on the same footing, as in the case of subjects or citizens of the country where they are established.

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When any vessel of either party shall be wrecked, foundered, or otherwise damaged, on the coasts or within the dominions of the other, their respective citizens or subjects shall receive, as well for themselves as for their vessels and effects the same assistance which would be due to the inhabitants of the country where the damage happens, and shall pay the same charges and dues only as the said inhabitants would be subject to pay in a like case; and if the operations of repair shall require that the whole or any part of the cargo be unladed, they shall pay no duties, charges, or fees on the part which they shall relade and carry away. The ancient and barbarous right to wrecks of the sea shall be entirely abolished with respect to the subjects or citizens of the two contracting parties.

Article X

The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testa-

ment, donation, or otherwise, and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods, whether by testament or ab intestato, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the representative, such care shall be taken of the said goods as would be taken of the goods of a native in like case, untill the lawfull owner may take measures for receiving them. And if question should arise among several claimants to which of them the said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. And where, on the death of any person, holding real estate, within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds, without molestation, and exempt from all rights of detraction on the part of the Government of the respective States. But this article shall not derogate in any manner from the force of the laws already published or hereafter to be published by His Majesty the King of Prussia, to prevent the emigration of his subjects.

Article XI

The most perfect freedom of conscience and of worship is granted to the citizens or subjects of either party within the jurisdiction of the other, and no person shall be molested in that respect for any cause other than an insult on the religion of others. Moreover, when the subjects or citizens of the one party shall die within the jurisdiction of the other, their bodies shall be buried in the usual burying-grounds, or other decent and suitable places, and shall be protected from violation or disturbance.

Article XII

Experience having proved, that the principle adopted in the twelfth article of the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the two last wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves or jointly with other Powers alike interested, to

concert with the great maritime Powers of Europe such arrangements and such permanent principles as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars. And if in the interval either of the contracting parties should be engaged in a war to which the other should remain neutral, the ships of war and privateers of the belligerent Power shall conduct themselves towards the merchant vessels of the neutral Power as favourably as the course of the war then existing may permit, observing the principles and rules of the law of nations generally acknowledged.

Article XIII

And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandize of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

All cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpeter, sulphur, cuirasses, pikes, swords, belts, cartouch boxes, saddles and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel, or passenger, ought to have; and in general whatever is comprised under the denomination of arms and

military stores, of what description soever, shall be deemed objects of contraband.

Article XIV

To ensure to the vessels of the two contracting parties the advantage of being readily and certainly known in time of war, it is agreed that they shall be provided with the sea-letters and documents hereafter specified:

1. A passport, expressing the name, the property, and the burthen the vessel, as also the name and dwelling of the master, which passport shall be made out in good and due form, shall be renewed as often as the vessel shall return into port, and shall be exhibited whensoever required, as well in the open sea as in port. But if the vessel be under convoy of one or more vessels of war, belonging to the neutral party, the simple declaration of the officer commanding the convoy, that the said vessel belongs to the party of which he is, shall be considered as establishing the fact, and shall relieve both parties from the trouble of further examination.

2. A charter-party, that is to say, the contract passed for the freight of the whole vessel, or the bills of lading given for the cargo in detail.

3. The list of the ship's company, containing an indication by name and in detail of the persons composing the crew of the vessel. These documents shall always be authenticated according to the forms established at the place from which the vessel shall have sailed.

As their production ought to be exacted only when one of the contracting parties shall be at war, and as their exhibition ought to have no other object than to prove the neutrality of the vessel, its cargo, and company, they shall not be deemed absolutely necessary on board such vessels belonging to the neutral party as shall have sailed from its ports before or within three months after the Government shall have been informed of the state of war in which the belligerent party shall be engaged. In the interval, in default of these specific documents, the neutrality of the vessel may be established by such other evidence as the tribunals authorised to judge of the case may deem sufficient.

Article XV

And to prevent entirely all disorder and violence in such cases, it is stipulated that, when the vessels of the neutral party, sailing without convoy, shall be met by any vessels of war, public or private, of the

other party, such vessel of war shall not send more than two or three men in their boat on board the said neutral vessel to examine her passports and documents. And all persons belonging to any vessel of war, public or private, who shall molest or insult in any manner whatever, the people, vessels, or effects of the other party, shall be responsible in their persons and property for damages and interest, sufficient security for which shall be given by all commanders of private armed vessels before they are commissioned.

Article XVI

In times of war, or in cases of urgent necessity, when either of the contracting parties shall be obliged to lay a general embargo, either in all its ports, or in certain particular places, the vessels of the other party shall be subject to this measure, upon the same footing as those of the most favoured nations, but without having the right to claim the exemption in their favour stipulated in the sixteenth article of the former treaty of 1785. But on the other hand, the proprietors of the vessels which shall have been detained, whether for some military expedition, or for what other use soever, shall obtain from the Government that shall have employed them an equitable indemnity, as well for the freight as for the loss occasioned by the delay. And furthermore, in all cases of seizure, detention, or arrest, for debts contracted or offences committed by any citizen or subject of the one party within the jurisdiction of the other, the same shall be made and prosecuted by order and authority of law only, and according to the regular course of proceedings usual in such cases.

Article XVII

If any vessel or effects of the neutral Power be taken by an enemy of the other, or by a pirate, and retaken by the Power at war, they shall be restored to the first proprietor, upon the conditions hereafter stipulated in the twenty-first article for cases of recapture.

Article XVIII

If the citizens or subjects of either party, in danger from tempests, pirates, enemies, or other accidents, shall take refuge, with their vessels or effects, within the harbours or jurisdiction of the other, they shall be received, protected, and treated with numanity and kindness, and shall be permitted to furnish themselves, at reasonable prices, with

all refreshments, provisions, and other things necessary for their sustenance, health, and accom[m]odation, and for the repair of their vessels.

Article XIX

The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to shew. But, conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects shall have a right to shelter in the ports of the United States, but if forced therein by tempests, or any other danger or accident of the sea, they shall be obliged to depart as soon as possible.

Article XX

No citizen or subject of either of the contracting parties shall take from any Power with which the other may be at war any commission or letter of marque, for arming any vessel to act as a privateer against the other, on pain of being punished as a pirate; nor shall either party hire, lend, or give any part of its naval or military force to the enemy of the other, to aid them offensively or defensively against the other.

Article XXI

If the two contracting parties should be engaged in a war against a common enemy, the following points shall be observed between them:

1. If a vessel of one of the parties, taken by the enemy, shall, before being carried into a neutral or enemy's port, be retaken by a ship of war or privateer of the other, it shall, with the cargo, be restored to the first owners, for a compensation of one-eighth part of the value of the said vessel and cargo, if the recapture be made by a public ship of war, and one-sixth part, if made by a privateer.

2. The restitution in such cases shall be after due proof of property, and surety given for the part to which the recaptors are entitled.

3. The vessels of war, public and private, of the two parties, shall

reciprocally be admitted with their prizes into the respective ports of each, but the said prizes shall not be discharged or sold there, until their legality shall have been decided according to the laws and regulations of the State to which the captor belongs, but by the judicatories of the place into which the prize shall have been conducted.

4. It shall be free to each party to make such regulations as they shall judge necessary, for the conduct of their respective vessels of war, public and private, relative to the vessels, which they shall take, and carry into the ports of the two parties.

Article XXII

When the contracting parties shall have a common enemy, or shall both be neutral, the vessels of war of each shall upon all occasions take under their protection the vessels of the other going the same course, and shall defend such vessels as long as they hold the same course, against all force and violence, in the same manner as they ought to protect and defend vessels belonging to the party of which they are.

Article XXIII

If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance; and all women and children scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power by the events of war they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price.

Article XXIV

And to prevent the destruction of prisoners of war, by sending them into distant and inclement countries, or by crowding them into close and noxious places, the two contracting parties solemnly pledge them-

selves to the world and to each other that they will not adopt any such practice; that neither will send the prisoners whom they may take from the other into the East Indies or any other parts of Asia or Africa, but that they shall be placed in some parts of their dominions in Europe or America, in wholesome situations; that they shall not be confined in dungeons, prison-ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs; that the officers shall be enlarged on their paroles within convenient districts, and have comfortable quarters, and the common men be disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomly and good as are provided by the party in whose power they are for their own troops; that the officers shall also be daily furnished by the party in whose power they are with as many rations, and of the same articles and quality as are allowed by them, either in kind or by commutation, to officers of equal rank in their own army; and all others shall be daily furnished by them with such ration as they shall allow to a common soldier in their own service; the value whereof shall be paid by the other party on a mutual adjustment of accounts for the subsistence of prisoners at the close of the war; and the said accounts shall not be mingled with or set off against any others, nor the balances due on them be withheld as a satisfaction or reprizal for any other article or for any other cause, real or pretended, whatever. That each party shall be allowed to keep a commissary of prisoners of their own appointment, with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him; but if any officer shall break his parole, or any other prisoner shall escape from the limits of his cantonment after they shall have been designated to him, such individual officer or other prisoner shall forfeit so much of the benefit of this article as provides for his enlargement on parole or cantonment. And it is declared, that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations.

Article XXV

The two contracting parties have granted to each other the liberty of having each in the ports of the other Consuls, Vice-Consuls, Agents, and Commissaries of their own appointment, who shall enjoy the same privileges and powers as those of the most favoured nations; but if any such Consuls shall exercise commerce, they shall be submitted to the same laws and usages to which the private individuals of their nation are submitted in the same place.

Article XXVI

If either party shall hereafter grant to any other nation any particular favour in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.

Article XXVII

His Majesty the King of Prussia and the United States of America agree that this treaty shall be in force during the term of ten years from the exchange of the ratifications; and if the expiration of that term should happen during the course of a war between them, then the articles before provided for the regulation of their conduct during such a war shall continue in force until the conclusion of the treaty which shall restore peace.

This treaty shall be ratified on both sides, and the ratifications exchanged within one year from the day of its signature, or sooner if possible.

In testimony whereof, the Plenipotentiaries before mentioned have hereto subscribed their names and affixed their seals. Done at Berlin, the eleventh of July, in the year one thousand seven hundred and ninety-nine.

[Seal.] John Quincy Adams.
[Seal.] Charles William Comte de Finkenstein.
[Seal.] Philippe Charles d'Alvensleben.
[Seal.] Chretien Henri Curce Comte de Haugwitz.

TREATY OF 1828[1]

Concluded May 1, 1828; Ratification Advised by the Senate, May 14, 1828; Ratification again Advised and Time for Exchange of Ratification Extended by the Senate, March 9, 1829; Ratifications Exchanged March 14, 1829; Proclaimed March 14, 1829.

The United States of America and His Majesty the King of Prussia, equally animated with the desire of maintaining the relations of good understanding which have hitherto so happily subsisted between their respective States, of extending, also, and consolidating the commercial intercourse between them, and convinced that this object cannot better be accomplished than by adopting the system of an entire freedom of navigation, and a perfect reciprocity, based upon principles of equity equally beneficial to both countries, and applicable in time of peace as well as in time of war, have, in consequence, agreed to enter into negotiations for the conclusion of a treaty of navigation and commerce; for which purpose the President of the United States has conferred full powers on Henry Clay, their Secretary of State; and His Majesty the King of Prussia has conferred like powers on the Sieur Ludwig Niederstetter, Chargé d'Affaires of His said Majesty, near the United States; and the said Plenipotentiaries, having exchanged their said full powers, found in good and due form, have concluded and signed the following articles:

Article I

There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective States shall mutually have liberty to enter the ports, places, and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty, to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing.

Article II

Prussian vessels arriving either laden or in ballast in the ports of the United States of America, and, reciprocally, vessels of the United States arriving either laden or in ballast in the ports of the Kingdom of Prus-

[1] 8 Stat. L. 378; Malloy's *Treaties*, etc., Vol. 2, p. 1496.

sia, shall be treated, on their entrance, during their stay, and at their departure, upon the same footing as national vessels coming from the same place, with respect to the duties of tonnage, light-houses, pilotage, salvage, and port charges, as well as to the fees and perquisites of public officers, and all other duties and charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishment whatsoever.

Article III

All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the Kingdom of Prussia, in Prussian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Prussian vessels. And, reciprocally, all kind of merchandise and articles of commerce, either the produce of the soil or of the industry of the Kingdom of Prussia, or of any other country, which may be lawfully imported into the ports of the United States in vessels of the said States, may also be so imported in Prussian vessels, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

Article IV

To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are to their full extent applicable to Prussian vessels and their cargoes arriving in the ports of the United States of America, and, reciprocally, to vessels of the said States and their cargoes, arriving in the ports of the kingdom of Prussia, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country.

Article V

No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of Prussia, and no higher or other duties shall be imposed on the importation into the Kingdom of Prussia of any article the produce or manufacture of the United States, than are or shall be payable on the like article being the produce or manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article the produce or manufacture of the United States, or of Prussia, to or from the ports of the United States, or to or from the ports of Prussia, which shall not equally extend to all other nations.

Article VI

All kind of merchandise and articles of commerce, either the produce of the soil or of the industry of the United States of America, or of any other country, which may be lawfully exported from the ports of the said United States in national vessels, may also be exported therefrom in Prussian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been exported in vessels of the United States of America.

An exact reciprocity shall be observed in the ports of the Kingdom of Prussia, so that all kind of merchandise and articles of commerce, either the produce of the soil or the industry of the said Kingdom, or of any other country, which may be lawfully exported from Prussian ports in national vessels, may also be exported therefrom in vessels of the United States of America, without paying other or higher duties or charges of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been exported in Prussian vessels.

Article VII

The preceding articles are not applicable to the coastwise navigation of the two countries, which is respectively reserved by each of the high contracting parties exclusively to itself.

Article VIII

No priority or preference shall be given, directly or indirectly, by either of the contracting parties, nor by any company, corporation, or agent, acting on their behalf or under their authority, in the purchase of any article of commerce, lawfully imported, on account of or in reference to the character of the vessel, whether it be of the one party or of the other, in which such article was imported; it being the true intent and meaning of the contracting parties that no distinction or difference whatever shall be made in this respect.

Article IX

If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.

Article X

The two contracting parties have granted to each other the liberty of having, each in the ports of the other, Consuls, Vice-Consuls, Agents, and Commissaries of their own appointment, who shall enjoy the same privileges and powers as those of the most favored nations. But if any such Consul shall exercise commerce, they shall be submitted to the same laws and usages to which the private individuals of their nation are submitted, in the same place.

The Consuls, Vice-Consuls, and Commercial Agents shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country, or the said Consuls, Vice-Consuls, or Commercial Agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood, that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country.

Article XI

The said Consuls, Vice-Consuls, and Commercial Agents are authorised to require the assistance of the local authorities, for the search, arrest, and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges, and officers, and shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and, on this reclamation being thus substantiated, the surrender shall not be refused. Such deserters, when arrested, shall be placed at the disposal of the said Consuls, Vice-Consuls, or Commercial Agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be sent to the vessels to which they belonged, or to others of the same country. But if not sent back within three months from the day of their arrest, they shall be set at liberty, and shall not be again arrested for the same cause. However, if the deserter should be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which his case shall be depending shall have pronounced its sentence, and such sentence shall have been carried into effect.

Article XII

The twelfth article of the treaty of amity and commerce, concluded between the parties in 1785, and the articles from the thirteenth to the twenty-fourth, inclusive, of that which was concluded at Berlin in 1799, with the exception of the last paragraph in the nineteenth article, relating to treaties with Great Britain, are hereby revived with the same force and virtue as if they made part of the context of the present treaty, it being, however, understood that the stipulations contained in the articles thus revived shall be always considered as in no manner affecting the treaties or conventions concluded by either party with other Powers, during the interval between the expiration of the said treaty of 1799, and the commencement of the operation of the present treaty.

The parties being still desirous, in conformity with their intention declared in the twelfth article of the said treaty of 1799, to establish between themselves, or in concert with other maritime Powers, further provisions to ensure just protection and freedom to neutral navigation

and commerce, and which may, at the same time, advance the cause of civilization and humanity, engage again to treat on this subject at some future and convenient period.

Article XIII

Considering the remoteness of the respective countries of the two high contracting parties, and the uncertainty resulting therefrom, with respect to the various events which may take place, it is agreed that a merchant vessel belonging to either of them, which may be bound to a port supposed at the time of its departure to be blockaded, shall not, however, be captured or condemned for having attempted a first time to enter said port, unless it can be proved that said vessel could and ought to have learnt, during its voyage, that the blockade of the place in question still continued. But all vessels which, after having been warned off once shall, during the same voyage, attempt a second time to enter the same blockaded port, during the continuance of the said blockade, shall then subject themselves to be detained and condemned.

Article XIV

The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation, or otherwise; and their representatives, being citizens or subjects of the other party, shall succeed to their said personal goods, whether by testament or ab intestato, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the representative, such care shall be taken of the said goods as would be taken of the goods of a native, in like case, until the owner may take measures for receiving them. And if question should arise among several claimants to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. And where, on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation and exempt

from all duties of detraction, on the part of the Government of the respective States. But this article shall not derogate in any manner from the force of the laws already published, or hereafter to be published by His Majesty the King of Prussia, to prevent the emigration of his subjects.

ARTICLE XV

The present treaty shall continue in force for twelve years, counting from the day of the exchange of the ratifications; and if twelve months before the expiration of that period, neither of the high contracting parties shall have announced, by an official notification to the other, its intention to arrest the operation of said treaty, it shall remain binding for one year beyond that time, and so on until the expiration of the twelve months, which will follow a similar notification, whatever the time at which it may take place.

ARTICLE XVI

This treaty shall be approved and ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Majesty the King of Prussia, and the ratifications shall be exchanged in the city of Washington, within nine months from the date of the signature hereof, or sooner if possible.

In faith whereof the respective Plenipotentiaries have signed the above articles, both in the French and English languages, and they have thereto affixed their seals; declaring, nevertheless, that the signing in both languages shall not be brought into precedent, nor in any way operate to the prejudice of either party.

Done in triplicate at the city of Washington on the first day of May, in the year of our Lord one thousand eight hundred and twenty-eight, and the fifty-second of the Independence of the United States of America.

[Seal.] H. CLAY.

[Seal.] LUDWIG NIEDERSTETTER.

CASE OF DESERTERS FROM THE PRUSSIAN FRIGATE "NIOBE"[1]

The provisions of the treaty of May 1, 1828, between the United States and Prussia, for the arrest and imprisonment of deserters from public ships and merchant vessels of the respective countries, applies to public vessels sailing under the flag of the North German Union and deserters from such vessels.

ATTORNEY GENERAL'S OFFICE,
August 19, 1868.

Sir: I have considered the opinion of the examiner of claims in your department, transmitted to me under cover of your letter of the 20th ultimo, upon the question, how far the treaty of 1828, between the United States and Prussia, on the subject of the arrest and imprisonment by the local authorities of each country of deserters from the ships of war and merchant vessels of the other, is obligatory upon the United States in respect to deserters from the public and private vessels sailing under the flag of the North German Union.

The result of the victory of Sadowa and the negotiations of Nicholsburg was the territorial enlargement of Prussia, by the annexation of Hesse Cassel, Nassau, Hanover, Holstein, and Frankfort, and the foundation of a confederation or union between Prussia, thus enlarged in territory and population, and the North German States, under a constitution of government which gave the king of Prussia the presidency of the union, with power to declare war and conclude peace, make treaties with foreign States, accredit ministers and receive them, likewise the command, in war and in peace, of the entire army and navy of the union, with power, whenever the public safety is threatened, to declare martial law in any part of the union.

Prussia has a treaty of commerce and navigation with the United States, dated May 1, 1828, which provides, that the consuls of the respective governments "are authorized to require the assistance of the local authorities for the search, arrest, and imprisonment of the deserters from the ships of war and merchant vessels of their country."

In April last application was made, under this provision of the treaty

[1] 12 Op. Atty. Gen.

with Prussia, by the consul general of the North German Union in New York, to a United States commissioner, for a warrant for the arrest of eleven deserters from a public armed vessel, sailing under the flag of the union, which is styled by the minister of Prussia near this Government as "His majesty's frigate Niobe." The application of the consul general was refused by the commissioner, upon the general ground that the treaty stipulation referred to did not apply to vessels belonging to the North German Union. Baron Gerolt, the diplomatic representative here of the North German Union, protests against the refusal of the commissioner to issue a warrant for the arrrest of these deserters; and hence the question is presented as to the validity of the objection urged by the commissioner to the right of the consular representative of the union to claim, on behalf of that government, in respect to deserters from one of its public armed vessels, the benefits of the treaty of 1828. The examiner of claims, in the opinion you have transmitted to me, has discussed not only this question, which is practically the only one that has been raised, so far as I am informed, by any events that have actually transpired calling for a consideration of our treaty relations with the States of the North German Union, but also the larger question as to the effect of the change in the political status and relations of the States consolidated and confederated with Prussia, upon the stipulations in our treaties of commerce and navigation with Prussia and those other States, in respect to the seamen deserting from their merchant vessels now sailing under a common national flag. I fully concur in the conclusion of the law officer of your department, that the commissioner at New York erred in refusing to issue a warrant for the arrest of the deserting seamen of the frigate "Niobe," but I will forbear at this time, with your permission, from giving an official opinion on the more doubtful and difficult questions which are discussed in the papers from your department now before me. It seems to me that a better occasion, perhaps, would be afforded for such a discussion when a case practically shall arise calling for the communication of the views of the Executive in regard to our treaties with the States of the North German Union to those judicial functionaries who, under our system of government, are intrusted with the due fulfillment and execution of those treaties on the part of the United States, in respect to the subjects-matter particularly discussed by the examiner of claims.

In regard to naval vessels of the North German Union, I am clearly of opinion that they are the ships of war of Prussia, within the

meaning of the treaty of 1828, and that deserters therefrom may be arrested by the proper local authorities of the United States, on the application of the proper consular officer of the union, pursuant to that treaty. I have referred incidentally to those provisions of the constitution of the union, which declare as follows:

> The presidency of the union belongs to the crown of Prussia. The crown of Prussia is therefore entitled to represent the union as a nation, and to declare war and conclude peace in the name of the union, to form alliances and make other treaties with foreign States, accredit ministers and receive them.
>
> The aggregate land forces of the union shall form a single army, which, in war and peace, is placed under the command of his majesty the king of Prussia, as commander-in-chief of the union.
>
> The entire navy of the union is under the command of Prussia. Its organization belongs to the king of Prussia, who appoints its officers and officials, who take the oath of allegiance to him.

The construction and effect given by the examiner of claims to these provisions of the constitution of the German Union seem to be well supported by the course of reasoning pursued in his opinion, and I content myself at present with an expression of satisfaction with his view as applied to the case to which your attention has been directed by Baron Gerolt.

I would not be understood as entertaining any objection to the recommendation which the law officer of your department has deemed necessary to make looking to a review of our treaties with the States of the North German Union. The relations of the States of North Germany to one another and to the United States have been so considerably modified by the confederation of 1867, that many perplexing questions of reciprocal rights and obligations are likely to arise under those various treaties, and those questions it may be deemed the part of good statesmanship to avoid, by new treaties adapted to the present condition of the North German States.

I desire to remark, in conclusion, that under our system stipulations for the apprehension, within our jurisdiction, of deserters from foreign vessels, are executed by officers of the judicial department of the Government, in virtue of special authority conferred by acts of Congress. The questions arising upon the interpretation and effect of such treaties must, therefore, be peculiarly and primarily questions of judicial cognizance and consideration. The act of March 2, 1829, authorizes any court, judge, justice, or other magistrate, having competent power, to

issue warrants for the arrest, for examination, of seamen deserting from the vessels of any foreign governments with whom we have treaties for the restoration of deserting seamen, upon the application of the consular officers of such governments, with authority to deliver up such seamen to such consular officers. The subsequent act of February 24, 1855, confers upon commissioners of the circuit courts of the United States similar authority. The officers named in these statutes are not subject to the control or direction of the executive department of the Government.

Applications for the apprehension of deserting seamen are made to them directly by the consuls of foreign governments, and it may well occur that such applications are disposed of summarily, and before any opportunity can arise for intervention by the diplomatic representative of the foreign government, or the political department of our own Government. It may be of the highest consequence, that in a case involving the construction of such a treaty, full opportunity should be afforded both this and the foreign government for the presentation of their views upon the subject to the judicial functionary the exercise of whose jurisdiction has been invoked in the particular case. I apprehend that the learned commissioner, who refused to issue his warrant in the case of the seamen of the "Niobe," would have taken a different view of the treaty in question if his attention had been particularly called to those provisions of the constitution of the North German Union which I have referred to.

It may be proper, in case you agree with the view I have taken of that treaty in respect to public armed vessels under the flag of the North German Union, to make the district attorney of the United States at New York acquainted with your opinion, and to give such instructions to that officer as will enable him to make proper representation of that opinion to the commissioner or other judicial functionary in any future case of like character, and to advise your department of the occurrence of other cases arising under our treaties with the States of the North German Union that may call for renewed consideration of the subject by your department.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

HON. WM. H. SEWARD,
Secretary of State.

TONNAGE DUTY[1]

The discrimination as to tonnage duty in favor of vessels sailing from the regions mentioned in the act of June 26, 1884, chapter 121, and entered in our ports, is purely geographical in character, inuring to the advantage of any vessel of any power that may choose to transport between this country and any port embraced by the fourteenth section of that act.

DEPARTMENT OF JUSTICE,
September 19, 1885.

Sir: Your communication of the 8th September, instant, with the inclosures therein referred to, has received my deliberate consideration, and I have the honor to submit, in reply, that I agree with you entirely in the interpretation you place on the fourteenth section of the act of Congress of the 26th June, 1884, entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes," and in your conclusion that the claims set up by the several powers mentioned by you are not founded.

The discrimination as to tonnage duty in favor of vessels sailing from the regions mentioned in the act and entered in our ports is, I think, purely geographical in character, inuring to the advantage of *any* vessel of *any* power that may choose to fetch and carry between this country and any port embraced by the fourteenth section of the act.

I see no warrant, therefore, to claim that there is anything in "the most favored nation" clause of the treaty between this country and the powers mentioned that entitles them to have the privileges of the fourteenth section extended to their vessels sailing to this country from ports outside the limitation of the act.

Your able and comprehensive discussion of the subject renders it quite unnecessary for me to treat it at large.

I have the honor to be, your most obedient servant,

W. A. MAURY,
Acting Attorney-General.

THE SECRETARY OF STATE.

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[1] 18 Op. Atty. Gen.

Annex

Correspondence With the Legation of Germany in Washington[1]

No. 10

Mr. von Alvensleben to Mr. Bayard

[Translation]

Imperial German Legation,
Washington, August 3, 1885 (Received August 5).

The undersigned, imperial German ambassador extraordinary and minister plenipotentiary, has, in accordance with the orders he has received, the honor to make the following very respectful communication to Hon. Thomas F. Bayard, Secretary of State of the United States.

By a law of June 26, 1884 (an act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes), section 14 (tonnage tax), it has been provided that vessels which sail from a port in North or Central America, in the West Indian Islands, the Bahama, Bermuda, and Sandwich Islands, to a port of the United States, shall pay in it, in place of the previous tonnage tax of 30 cents per ton a year, only 3 cents per ton, and not more than 15 cents a year, whilst vessels from other foreign ports have to bear a tax of 6 cents. This lowering of the tax to 3 cents has been granted to the favored countries—Canada, Newfoundland, the Bahamas, Bermuda, and West Indian Islands, Mexico, and Central America, including Panama and Aspinwall—unconditionally and without regard to the taxes, however relatively high, these countries on their side levy on American ships.

Article IX of the Prussian-American treaty of the 1st of May, 1828, which has been lately, in the correspondence between the cabinets of Berlin and Washington concerning the petroleum railroad rates as well as because of the Spanish-American treaty concerning the trade of Cuba and Puerto Rico, successively asserted by both Governments to be valid for all Germany, runs as follows:

> If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.

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[1] *Foreign Relations*, 1888, part 2, pp. 1872-1878.

Note: The correspondence subsequent to the date of the Attorney General's opinion is also printed in order to complete the diplomatic side of the controversy.

The treaties which the United States in their time have concluded with the Hanse cities, Oldenburg and Mecklenburg, contain similar provisions. In accordance with the purport of these, Germany has an immediate claim, and without making any concession in return, to participate in the enjoyment of the tonnage tax abatement to 3 cents per ton, which has been unconditionally conceded.

The undersigned is, in accordance with the view of the Imperial Government, above set forth, directed to claim from the Government of the United States for German vessels the abatement of the tonnage tax to 3 cents per ton, and to propose, at the same time, the repayment of the tonnage tax which at the rate of 6 cents per ton has been overpaid since the law of the 26th of June, 1884, went into effect.

While the undersigned reserves for himself the right to make in due time proper proposals in reference to the abatement provided over and above this in the law of the 26th June of last year, dependent on certain conditions, and which (abatement) may in the future even exceed that of 3 cents per ton, according to the result of proper inquiries concerning the tonnage dues and other taxes, hereafter to be levied in German harbors, he has the honor to request very respectfully that the Secretary of State will kindly take the proper course, so that German shipping may as soon as possible participate in the unconditional favor, to which it is entitled, of an abatement of the tonnage tax to 3 cents.

The undersigned has the honor to await, very respectfully, your kind answer in reference to this matter, and avails himself, etc.

H. v. ALVENSLEBEN.

No. 11

Mr. Bayard to Mr. von Alvensleben

DEPARTMENT OF STATE,
Washington, November 7, 1885.

Sir: I had the honor to receive in due season your note of August 3 last, touching the application of the provisions of the fourteenth section of the shipping act, approved June 26, 1884, in respect of the collection of tonnage tax to vessels of Germany coming from ports of that country to ports of the United States, under the most favored nation clause of the existing treaty of 1828 between the United States and Germany.

The importance of the questions involved in the claim of the German Government and in like claims preferred by other governments has led to the submission of the entire subject to the judgment of the Attorney-General.

The conclusions of the Department of Justice, after a careful examination of the premises, are that—

The discrimination as to tonnage duty in favor of vessels sailing from the regions mentioned in the act, and entered into our ports is, I think, purely geographical in character, inuring to the advantage of any vessel of any power that may choose to fetch and carry between this country and any port embraced by the fourteenth section of the act. I see no warrant, therefore, to claim that there is anything in "the most favored nation clause" of the treaty between this country and the powers mentioned that entitles them to have the privileges of the fourteenth section extended to their vessels sailing to this country from ports outside of the limitation of the act.

These conclusions are accepted by the President, and I have, accordingly, the honor to communicate them to you, as fully covering the points presented in your note of August 3 last.

Accept, etc.

T. F. BAYARD.

No. 12

Count Leyden to Mr. Bayard

[Translation]

IMPERIAL GERMAN LEGATION,

Washington, November 17, 1885 (Received November 19).

MR. SECRETARY OF STATE:

I have the honor most respectfully to acknowledge the receipt of your polite note of the 7th instant, whereby you inform me that the Department of Justice of the United States has decided in the matter of the application of the provisions of section 14 of the act relative to navigation of June 26, 1884, to German vessels, that the reduction of tonnage duties which is provided for a specified region is of a purely geographical character, and that the most favored nation clause can consequently have no application in this case.

I have the honor, at the same time, to inform you that I have brought the contents of your aforesaid note to the notice of the Imperial Government.

Accept, etc.,

COUNT LEYDEN.

No. 13

Mr. von Alvensleben to Mr. Bayard

[Translation]

IMPERIAL GERMAN LEGATION,

Washington, February 16, 1886 (Received February 18).

MR. SECRETARY OF STATE:

The Imperial Government has seen by your note of November 7,

1885, relative to the enforcement of the provisions of section 14 of the navigation act of June 26, 1884, that the United States Government rejects the application (made on the basis of the most favored-nation treaties now existing with Prussia and the German States) for equal rights with the States of North and Central America and the West Indies. This rejection is based on the ground that that exemption which is granted to all vessels of all powers sailing between the countries in question and the United States is purely geographical in its character, and can not, therefore, be claimed by other States in view of the most favored-nation clause.

I am instructed, and I have the honor most respectfully to reply to this, that such a line of argument is a most unusual one, and is calculated to render the most favored-nation clause wholly illusory. On the same ground, it would be quite possible to justify, for instance, a privilege granted exclusively to the South American States, then one granted also to certain of the nearer European nations, so that finally, under certain circumstances, always on the pretext that the measure was one of a purely geographical character, Germany alone, among all the nations that maintain commercial relations with America, notwithstanding the most favored-nation right granted to that country by treaty, might be excluded from the benefits of the act.

It can not be doubted, it is true, that on grounds of purely local character certain treaty stipulations between two powers, or certain advantages autonomically granted, may be claimed of third States not upon the ground of a most favored-nation clause. Among these are included facilities in reciprocal trade on the border, between States whose territories adjoin each other. It is, however, not to be doubted that the international practice is that such facilities, not coming within the scope of a most favored-nation clause, are not admissible save within very restricted zones. In several international treaties these zones are limited to a distance of ten kilometers from the frontier. From this point of view, therefore, the explanation given by the United States Government of section 14 of the shipping act can not be justified.

This law grants definite advantages to entire countries, among others to those situated at a great distance from the United States; these advantages are, beyond a doubt, equivalent to facilities granted to the trade and navigation of those countries, even if they do, under certain circumstances, inure to the benefit of individual vessels of foreign nations. It scarcely need be insisted upon that these advantages favor the entire commerce of the countries specially designated in the act, since they are now able to ship their goods to the United States on terms that have been artificially rendered more favorable than those on which other countries not thus favored are able to ship theirs.

The treaty* existing between Prussia and the United States expressly stipulates that—

*Treaty of 1828, Art. IX.

> If either party shall hereafter grant to any other nation any particular favor in navigation or commerce it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional.

Such a compensation, so far as the reduction of the tonnage tax to 3 cents is concerned, has not been stipulated for by the United States in the aforesaid shipping act. Germany is, therefore, *ipso facto*, entitled to the reduction of the tax in favor of vessels sailing from Germany to the United States, especially since, according to the constitution of the Empire, no tonnage tax is collected in Germany from foreign vessels; that is to say, no tonnage tax of the character of American tonnage taxes in the sense of section 8, paragraph 1, article 1, of the American Constitution, viz, those designed to pay the debts of the Government and to pay the expenses of the common defense and the general welfare.

As you remark in your esteemed note, Mr. Secretary of State, you have based your decision on an opinion of the Attorney-General. In opposition to this view, it will be seen by the printed decisions of the Secretary of Treasury, that the latter, in an opinion on this subject addressed to the Department of State under date of May 11, 1885, expressed the opinion that vessels sailing from Portugal to the United States are, indeed, entitled to the privileges granted by section 14 of the shipping act, on the ground of the most favored-nation treaty existing between the two nations. This opinion harmonizes in the main with the view entertained by the Imperial Government.

The Imperial Government entertains the hope, in view of the foregoing considerations, that the United States Government on reconsidering this matter will not maintain the position taken in the note of November 7, 1885, and that it will grant to German vessels sailing between the two countries the same privileges that have long been granted without compensation by the German Empire to American vessels.

In having the honor, therefore, hereby to reiterate the application made in my note of August 3, 1885, for the reduction of the tonnage tax to 3 cents in favor of vessels engaged in trade between Germany and the United States, I hope that the decision of the United States Government in this matter will be kindly communicated to me.

Accept, etc.,

H. v. Alvensleben.

No. 14

Mr. Bayard to Mr. von Alvensleben

DEPARTMENT OF STATE,
Washington, March 4, 1886.

Sir: With reference to previous correspondence on the subject, I have the honor to acknowledge the receipt of your note of the 15th ultimo, relative to the question as to the applicability of the most favored nation clauses of the treaties of Prussia and other German states and the United States to the provisions of section 14 of the act of Congress of June 26, 1884.

In reply I beg to inform you that your note will have consideration, it being sufficient for the present to observe that Germany admits that neighborhood and propinquity justify a special treatment of intercourse which may not be extended to other countries under the favored nation clause in treaties with them, and only appears to question the distance within which the rule of neighborhood is to operate.

Accept sir, etc.,

T. F. BAYARD.

No. 15

Mr. von Alvensleben to Mr. Bayard

[Translation]

IMPERIAL GERMAN LEGATION,
Washington, August 1, 1886 (Received August 2).

MR. SECRETARY OF STATE:

I had the honor duly to receive your note of the 4th of March last, whereby you informed me that my observations concerning the applicability of the most favored nation clause to section 14 of the act of Congress of June 26, 1884, would be taken into consideration, and in which, for the time being, you confined yourself, by way of reply, to one remark.

In the mean time an act of Congress entitled "An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes," has been approved by the President of the United States under date of June 19, 1886 (Public—No. 85), and has thereby become a law. I have brought this act to the notice of the Imperial Government and have been instructed to state the view taken by that Government of this latest law and to ask your attention to its incompatibility with the stipulations of the treaty exising between Germany and the United States.

This act extends, in a measure, the power conferred upon the Presi-

dent by section 14 of the act of June 26, 1884, to diminish tonnage dues in certain cases.

According to the act of 1884 the President was authorized, only in the case of vessels coming from the ports of North and Central America, the West Indies, the Bahama, Bermuda, and Sandwich Islands, or Newfoundland, and entering ports of the United States, to reduce the duty of 3 cents per ton, which was imposed on such vessels, provided that the said duty exceeded the dues which American vessels were obliged to pay in the aforesaid ports.

A reduction of the duty of 6 cents, to which all vessels coming from other ports were subjected, was not allowable, even on the supposition in question.

Vessels from the aforesaid favored ports thus enjoyed a special preference in two ways: In the first place, they paid in all cases a duty of but 3 cents per ton, while vessels from other ports were obliged to pay 6 cents per ton; even these 3 cents could be remitted, either in whole or in part, provided that it could be shown that the duty paid by American vessels in the ports concerned amounted to less than 3 cents per ton, or that no such duty was levied in said ports. This latter privilege is, according to the new law, no longer to be exclusively enjoyed by vessels from the favored ports.

Likewise, vessels from other than the most favored ports may obtain a reduction or return of the duty of 6 cents to be paid by them per ton, provided that in the ports from which they have come American vessels pay less than 6 cents or no tonnage duty at all. The amount of the duty to be remitted is computed according to the amount of the duties levied in the ports of departure.

The new law is evidently based upon the idea of reciprocity. If this idea had been consistently carried out no objection could be made to it and the Imperial Government would have no further ground of complaint. This, however, is not the case, inasmuch as the new law grants special privileges, as did the old, to vessels from the above-mentioned ports, declaring that they, without any compensation on their part, shall pay but 3 cents per ton, even though a duty in excess of that amount is paid by American vessels in the ports concerned. The number of favored ports is even extended to those of South America bordering on the Caribbean Sea.

The Imperial Government has from the outset protested against this one sided privilege, which is in violation of the treaty stipulations of Germany with the United States. Since this privilege is not only not abolished by the new law, but is confirmed and even still further extended, the original attitude assumed by the Imperial Government towards the old law has been in no wise changed by the new act, and the Imperial Government must continue to protest against the violations of its treaty rights while maintaining the arguments contained in my note of February 15, 1886. As long as vessels from the ports of North and Central America pay but one-half the tonnage duty that is

levied upon vessels from German ports, without being required to furnish proof that less than 6 cents is exacted from American vessels in their ports, the Imperial Government will be obliged to maintain its claim for similar usage, viz, the exemption from furnishing such proof.

As is stated in my note of February 15, 1886, the Imperial Government is unable to regard as conclusive your principal argument, viz, that the privilege in question is of a purely geographical character, because the effect of this privilege is to benefit, in point of fact, the entire trade and navigation of those countries in which the ports in question are situated. No paramount importance can be attached (as is done by the United States Government) to the mere form in which this privilege is granted to particular countries.

I am therefore instructed, on the ground of the treaty right pertaining to the Imperial Government, to reiterate its previous claim that German ports shall be placed on a footing precisely similar to that of North and Central American ports, etc., and most respectfully to request you, Mr. Secretary of State, to favor me with the further reply which, in your note of March 4, you gave me to understand that I might expect from you.

Accept, etc.,

H. v. ALVENSLEBEN.

DUTY—IMPORTED SALT—TREATY WITH PRUSSIA[1]

The treaty of May 1, 1828, between the United States and the Kingdom of Prussia, is to be taken as operative as respects so much of the German Empire as constitutes the Kingdom of Prussia. *Semble,* that it is not effective as regards the rest of that Empire.

The "most favored nation clause" in that treaty is not violated by paragraph 608 of the tariff act of August 27, 1894, laying a discriminating duty on salt imported from a country which imposes a duty on salt exported from the United States.

In case of conflict between a treaty and a subsequent statute, the latter governs.

The laws of a foreign country are not known to the Attorney-General, but are facts to be proved by competent evidence.

As to when the discriminating duty aforesaid applies to a country which imposes a duty on salt exported from the United States but lays a countervailing excise tax on domestic salt. *Quaere.*

DEPARTMENT OF JUSTICE,
November 13, 1894.

Sir: I have the honor to acknowledge your communication of October 27, asking my official opinion upon the question whether salt

[1] 21 Op. Atty. Gen. 80.

imported from the Empire of Germany is dutiable under paragraph 608 of the tariff act of August 27, 1894. That paragraph, which puts salt in general on the free list, contains the following proviso:

> *Provided*, That if salt is imported from any country whether independent or a dependency which imposes a duty upon salt exported from the United States, then there shall be levied, paid, and collected upon such salt the rate of duty existing prior to the passage of this act.

As Germany imposes a duty upon salt exported from the United States, German salt is apparently subject to the proviso just quoted. The German ambassador, however, claims it is entitled to come into the United States free on two grounds.

One is the "most favored nation clause," so called, which is embodied in the following provisions of the treaty of May 1, 1828, between the United States and Prussia:

ARTICLE V

> No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of Prussia, and no higher or other duties shall be imposed on the importation into the Kingdom of Prussia of any article the produce or manufacture of the United States than are or shall be payable on the like article being the produce or manufacture of any other foreign country. * * *

ARTICLE IX

> If either party shall hereafter grant to any other nation any particular favor in navigation or commerce it shall immediately become common to the other party freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.

It should be noted that while this treaty is to be taken as operative as respects so much of the German Empire as constitutes the Kingdom of Prussia no facts or considerations with which I have been made acquainted justify the assumption that it is to be taken as effective as regards other portions of the Empire. Neither am I informed whether the German salt, for which free admission into this country is demanded, is a product or manufacture of Prussia proper, or of some other part or parts of the German Empire.

If it be assumed, however, for present purposes, that the treaty of 1828 binds the United States as regards all the constituent parts of

the German Empire, the claim of the German ambassador, founded upon the "most favored nation clause," must be pronounced untenable for at least two conclusive reasons.

In the first place, the "most favored nation clauses" of our treaties with foreign powers have from the foundation of our Government been invariably construed both as not forbidding any internal regulations necessary for the protection of our home industries, and as permitting commercial concessions to a country which are not gratuitous, but are in return for equivalent concessions, and to which no other country is entitled except upon rendering the same equivalents. Thus, Mr. Jefferson, when Secretary of State in 1792, said of treaties exchanging the rights of the most favored nation that "they leave each party free to make what internal regulations they please, and to give what preference they find expedient to native merchants, vessels, and productions." In 1817 Mr. John Quincy Adams, acting in the same official capacity, took the ground that the "most favored nation clause only covered gratuitous favors and did not touch concessions for equivalents expressed or implied." Mr. Clay, Mr. Livingston, Mr. Evarts, and Mr. Bayard, when at the head of the Department of State, have each given official expression to the same view. It has also received the sanction of the Supreme Court in more than one well-considered decision, while in *Bartram* v. *Robertson* (122 U. S. 116), Mr. Justice Field, speaking for the whole court, expounded the stipulations of the "most favored nation clause" in this language (p. 120):

> They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that, in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect.

This interpretation of the "most favored nation clause," so clearly established as a doctrine of American law, is believed to accord with the interpretation put upon the clause by foreign powers—certainly by Germany and Great Britain. Thus, as the clause permits any internal regulations that a country may find necessary to give a preference to "native merchants, vessels, and productions," the representatives of both Great Britain and Germany expressly declared, at the International Sugar Conference of 1888, that the export sugar bounty of one

country might be counteracted by the import sugar duty of another without causing any discrimination which could be deemed a violation of the "most favored nation clause." So both Germany and Great Britain acquiesced in the position of the United States, that our treaty with Hawaii did not entitle those nations to equal privileges in regard to imports with those thus obtained by the United States, the privileges granted to the United States being in consideration of concessions by the United States which Germany and Great Britain not only did not offer to make, but, in the nature of things, could not make.

If these established principles be applied to the case in hand but one result seems to be possible. The form which the provisions of our recent tariff act relating to salt may have assumed is quite immaterial. It enacts, in substance and effect, that any country admitting American salt free shall have its own salt admitted free here, while any country putting a duty upon American salt shall have its salt dutiable here under the preexisting statute. In other words, the United States concedes "free salt" to any nation which concedes "free salt" to the United States. Germany, of course, is entitled to that concession upon returning the same equivalent. But otherwise she is not so entitled, and there is nothing in the "most favored nation clause" which compels the United States to discriminate against other nations and in favor of Germany by granting gratuitously to the latter privileges which it grants to the former only upon the payment of a stipulated price.

In the next place, even if the provisions of our recent tariff act under consideration could be deemed to contravene the "most-favored-nation clause" of the treaty with Germany—as they can not be for the reasons stated—the result will be the same. The tariff act is a statute later than the treaty and, so far as inconsistent with it, is controlling. The principle is too well settled to admit of discussion, and if any relief from its operations is desirable it can be obtained only through proper modifying legislation by Congress.

While the first proposition of the German ambassador proceeds upon the basis that Germany does levy an import duty on American salt, his second proposition is that in reality it does not do so. The duty, it is said, should be regarded as in fact an internal excise tax, since a tax equivalent to the duty is levied upon all salt in the country whenever and however it appears, and is the same upon salt produced in Germany as upon salt coming from the United States. It is matter of convenience merely that the tax upon American salt is collected

immediately upon its arrival in port. In short, the claim is that there is no discrimination against American salt, which is the evil our statute aims to prevent; that American salt and German salt are in reality treated on a footing of entire equality.

The validity of this proposition I do not think I am in a position to judge of, for want of sufficient data. The laws of Germany I do not and can not be expected to know, and, like other foreign laws, are facts to be proved by competent evidence. The statement respecting them made by the German ambassador in a communication to the Secretary of State (copy of which you inclose) are undoubtedly correct, but they leave me in doubt upon what seems to me a vital point, viz, whether the internal excise tax on salt referred to is imperial in character—that is, is levied by and belongs to the Imperial Government—or is local, and is levied by and belongs to one or more constituent states of the Empire. If it is of the latter character, it probably can not be considered in relation to the matter in hand any more than a like domestic tax of any one or more of the States of the United States could be considered in the same relation. If, however, it could be considered under any circumstances, then it is obviously material to know whether such tax is levied by all of the constituent states of the Empire, without exception, and actually or necessarily at the same rate.

As at present advised, therefore, salt imported from the Empire of Germany is, in my judgment, legally dutiable under the statute above quoted.

Respectfully, yours,

RICHARD OLNEY

THE SECRETARY OF THE TREASURY.

Decisions of Federal Courts

THE BARK ELWINE KREPLIN[1]

Seamen's Wages.—Desertion.—Imprisonment on Shore.—Consul.—Treaty With Prussia.—Jurisdiction.—Parties.—Practice.—Minor.—Executive Recognition.

A Prussian bark, with a crew whose term of service had not expired, was laid up at Staten Island, on account of the war between Prussia and France. A difficulty arose between the captain and the crew, and they demanded leave to go and see the consul. This the captain refused to allow, but agreed that one of them, named L., might go. They insisted that they would all go, and the captain went ashore to get the aid of the police. After he had gone, the crew informed the mate that they were going to see the consul, and went ashore, without serious objection from the mate. The captain, returning, was told by the mate that the men had gone ashore, and high words passed between them, which resulted in the mate's saying that he would go too, and he went ashore, without objection from the captain. The captain, with a police officer, overtook the crew, and all hands went before a police justice, where the captain made a complaint against the mate and the crew for mutiny and desertion. The justice informed the captain that he had no jurisdiction, but he directed a policeman to take the men into custody, and they were locked up. The captain then went before the Prussian consul, and made complaint, requesting that the crew be punished, and that they be kept in custody preliminarily, and stating that he could not receive the mate on board again. The consul then issued a requisition to a commissioner of the Circuit Court of the United States, stating that the men had deserted, and asking for a warrant to arrest the men, and, "if said charge be true," that they be detained until there should be an opportunity to send them back. The requisition the captain took to the police justice, who thereupon, without examination, committed all the men to the county jail, where they lay for ten days. On the direction of the consul, they were then released, and came to the consul's office, where they were advised to go to the ship, and ask the captain for their wages. Some of them went, and the captain agreed to meet the crew at the consul's office next day. He came there, but the parties failed to meet each other, and thereafter the seamen executed assignments of their wages to the mate,

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[1] 8 Fed. Cases, 592 (Case 4,427) ; 4 Benedict, 413.

NOTE.—This case was reversed by the Circuit Court, on the ground that this Court was prohibited, under the treaty with Prussia, from exercising jurisdiction. An application was made to the Supreme Court for a *mandamus*, to compel the Circuit Court to pass upon the merits, but was denied. Fed. Cases (No. 4426), vol. 8; 588.

but without consideration, and he filed this libel against the vessel, to recover the wages of all. The captain was part owner of the ship. He defended the suit, and claimed that the men had forfeited their wages by desertion; that they had agreed in the articles not to bring the suit; and that the Court, under the treaty between the United States and Prussia, had no jurisdiction.

Held, That, as to the mate and L., there could be no pretence of desertion, for they left the vessel with the captain's consent;

That, as the other seamen only left the ship, without taking their clothes, to go and see the consul, the charge of desertion was not made out against them;

That the conduct of the captain, in imprisoning the men, was unlawful, and sufficient to dissolve the contract of the mariners;

That no law permits the imprisonment of deserters in our jails, except on proof of the facts before a competent tribunal;

That the men were not prevented from bringing this suit by the clause in the article referring to that provision of the German mercantile law, that "the seaman is not allowed to sue the master in a foreign port," because this is not a suit against the master, and the master having, by his unlawful conduct, absolved the men from their agreement, had absolved them from this portion of it with the rest;

That the clause in the treaty between the United States and Prussia, that "the consuls, vice-consuls, and commercial agents shall have the right, as such to act as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committted to their charge, without the interference of the local authorities, unless, &c., &c.," was not sufficient to oust this Court of its jurisdiction over this controversy.

Whether this clause has any application to suits *in rem—quære.*

That the Prussian consul had not acted in this matter as judge or arbitrator, which words must be taken in their ordinary sense, implying investigation of facts upon evidence, the exercise of judgment as to their effect, and a determination thereon;

That the consul is not a Court, and neither his record nor his testimony is conclusive on this Court;

That, as the consul, though really appointed as consul of the North German Union, was recognized by the Executive Department as consul of Prussia by virtue of such appointment, the action of the Executive was binding on the Court, and he must be held to be the Prussian consul;

That the seamen might file a petition to be now made colibellants, and on such petition being filed, and the cancellation of their assignments to the mate, they would be entitled to decrees for their wages.

In admiralty, minors are allowed to sue for wages in their own name.

Benedict, J. This is a cause of subtraction of wages, instituted by Max Newman, who was the chief mate of the Prussian bark *Elwine Kreplin*, to recover the sum of $173, being the amount of his wages

earned in the capacity of chief mate of that vessel; and also the sum of $1,458, which is the aggregate amount of the wages of the crew, which he claims to recover as assignee of the seamen. A statement of the facts in proof is necessary to an understanding of the many questions raised.

The time of service and rates of wages are not disputed. The libel concedes the term of service for which the men were shipped to have been two years, which has not yet expired.

This term of service being admitted in the libel, is to be taken as proved, although it is not entirely clear from the agreement itself that such was its legal effect. In the prosecution of her voyage, the brig arrived in this port, and, war having broken out between Prussia and France, she was compelled to lay up here to wait for peace. She was accordingly laid up at Staten Island, and while there the difficulty arose which gave rise to the present litigation. It appears that on the morning of the 1st of August, 1870, before breakfast, the master undertook to chastise the cabin boy, in the cabin. The boy's cries being heard by the crew, who were at work on deck, they went in a body into the cabin, and challenged the right of the master to chastise the boy. The master thereupon desisted, and the men returned to their work on deck. The master soon followed, and an altercation ensued between the master and crew, in which various complaints were made, and some vile epithets applied to the master by the mate, who was not in the cabin with the men, but in the altercation on deck took part with the crew. During the dispute, the men, in a body, demanded permission to go before the consul with their complaints. Permission was given to one named Lutte, and perhaps to Martens also. The permission to Lutte is conceded by the master, but permission to Martens is denied. Upon permission being given to Lutte, the crew cried out, "We will all go." When the dispute ended, the captain went to his breakfast, and after breakfast went ashore, to obtain, as he says, the aid of the police, on account of the mutinous condition of the crew. After he was gone, the crew, having finished cleansing the decks, and eaten their breakfast, dressed and informed the mate, then in command, that they were going to the consul, and went ashore. No objection was made by the mate, beyond a suggestion that they had better wait till the captain returned. Soon after the men had left, the captain returned, but without any police, and was informed by the mate that the crew had gone ashore. Words thereupon passed between the

captain and mate, which resulted in the mate's saying, "I will go, too," whereupon he also left, without any objection by the master. On leaving the ship, the mate proceeded to the ferry leading to New York city, where the office of the Prussian consul is located. The rest of the crew appear to have followed the carpenter, who went to the police station to enter a complaint against the master for beating the boy, in whom the carpenter, doubtless, took more interest than the others, as he came from the same town in Germany. The master soon appeared at the police station, and shortly after at the ferry house, with a policeman. The mate, at their request, accompanied them to Justice Garret, a police justice of the village of Edgewater. There the captain made a complaint against the whole crew, including the mate, for mutiny and desertion, but was informed by the justice that he was without jurisdiction, and that application must be made to the United States courts. The justice, however, was afterwards induced to direct a policeman to take the men into custody, if he would do so at his own risk. This the policeman did, and the mate and men were then locked up.

The master next proceeded to the consul's office, and there made complaint in writing, of which a protocol was made, describing the occurrence of the morning on board the ship, and stating that the men were then in custody on Staten Island, and ending as follows: "I request of the consul-general the punishment of the entire crew, especially of the mate, Newman, who has instigated the complot. Since my life is not safe, I request that the entire crew be kept in custody preliminarily; and, under existing circumstances, I can not again take the mate on board."

The consul thereupon issued a requisition, the substance of which has been proved, in the absence of the original. To whom this requisition was addressed is not certain. Justice Garret thinks that it was addressed, "To any marshal or magistrate of the United States;" but it was written on a blank, which was addressed in print, "To the Commissioner of the Circuit Court of the United States for the —— District of New York," and it is not shown that the blank address was altered or filled up. This requisition, after referring to the treaty with Prussia stipulating for the return of deserting seamen, and authorizing the consul to require the assistance of the local authorities for the search, arrest and imprisonment of deserters, represented that these seamen, naming them, and including the mate and Lutte, had deserted from

this vessel on that day; that the consul made application for a warrant to the marshal of said district to cause the men to be arrested, and "if said charge be true, that they be detained at the consul's expense until there should be an opportunity to send them back. No action was taken by the consul in regard to the master's complaint, except to deliver this requisition to the master, who, instead of presenting it to a U. S. Commissioner, took it to Justice Garret, the next morning, and thereupon Justice Garret, without examination, committed all the men to the common jail of Richmond County, his commitment stating that it was upon the complaint of the master for desertion, and containing no allusion to the consul's requisition.

On the 9th of August the master desired a release of some of the men, and the consul appears to have directed a release of them all, but no order for their return to the ship was made by the consul or asked for by the master, nor was the production of the men before the consul directed.

On the 11th of August, two policemen took the mate and three of the men from the jail to the consul's office, and were then directed to release them, and the men were advised to go on board and persuade the master to pay them their wages. The next day the remaining four were released from jail, and during the day all the men appeared at the consul's office. They were again advised to go to the ship and ask the master for their wages, but they had no money to pay their ferriages from New York to Staten Island. By putting all their means together, however, enough was found to pay the ferriage of three. Accordingly, the mate, the carpenter and Lutte went to the ship and saw the master. The mate testifies that the captain promised to pay him and appointed the next day to meet him at the consul's.

The master admits making the appointment, and that he gave the mate his navigation book and entered in it the credits to date, but denies the promise to pay him. As to what actually took place at this interview, the witnesses differ, but the result was an arrangement to meet at the consul's office the next day. This meeting never took place. The men and the master appear to have been at the consul's during that day, but they failed to meet, although the master says that as he came down from the consul's he saw Torriff and Reischoff, two of the crew, whom he asked to return to the ship, and they laughed at him and said, "No! Not a bit of it." Subsequently, this action was commenced. Upon these facts it is contended that these seamen are

not entitled to recover their wages, admitted to have been earned in the service of this vessel, on several grounds.

Upon the merits, it is said that the wages have been forfeited by desertion.

The charge of desertion against the mate has no foundation. He left the ship openly without objection from the master, without taking any of his clothes, and with a remark, which, under the circumstances, was a notification that he was going to see the consul. He was shortly arrested and cast into prison and there kept during ten days of the extremely hot weather of last August, and then let out without a request or suggestion that he return to the vessel. Indeed, the master had expressly declared that he should not return. It is vain to contend that these facts present any of the features of desertion, so far as the mate is concerned. With regard to Lutte, the case is still stronger, for the master concedes that Lutte asked and obtained of him permission to go to the consul. He also was in a similar manner imprisoned as a deserter. With regard to the other seamen the case is simply one of leaving the ship without permission. "It has been uniformly held that it is not desertion, for the seamen to leave the vessel against orders to go before the consul at a foreign port to complain of their treatment." (1 Pars.' Mar. Law, 470, note.) In this case the men did not take their clothes. When the master gave permission to Lutte to go to the consul, they announced their intention to go too. When they left they informed the mate, who was then in command (*The Union*, Bl. & H. 563), that they were going to see the consul. Upon the evidence, I find nothing to justify the master in supposing that the men were not going to the consul, and would not return to the ship at nightfall, and yet they were all at once arrested and cast into prison; and, so far as appears, without any prior request that they return to the ship. To hold such a leaving of the ship to be desertion is impossible. But it is said that when released from jail they refused to return to duty, and are therefore deserters. There is some evidence to this effect, but it is loose, and, upon a consideration of all the evidence, I am satisfied that the master never in fact communicated to the men either an intention to forfeit their wages or a desire to have them again in his service. As to the mate, he had expressly refused to have him on board. As to Kruise and Reischoff, he had, before the difficulty, given them to understand that they would be permitted to leave. He was half owner. His vessel was laid up to

await the result of a great war—only the services of watchmen were required on board—and he had engaged two other men for that duty. He had, therefore, no reason to desire the return of the men, and, I am satisfied, did not desire it, although he may have been quite willing to make out a case of desertion, in the hope of saving the very considerable sum due the men; but his action was such as to lead the men to suppose that their leaving the service of the ship was acquiesced in, and such, it appears, was the impression formed by the consul, for he says he told the men he was sure the captain would pay them their wages. I am, therefore, of the opinion that the connection of the men with the ship was severed by mutual consent, and consequently, they are entitled to their wages.

But if this be not so, I am of the opinion that the conduct of the master, in imprisoning these men, was unlawful, and sufficient to dissolve the contract of the mariners; and I apply to the case of these foreign seamen in an American port the same rule which our Courts have applied in cases of the imprisonment of American seamen in foreign ports. The rule is stated as follows:

"The practice of imprisoning disobedient and refractory seamen in foreign jails is one of doubtful legality. It is certainly to be justified only by a strong case of necessity. It should be used as one of safety, rather than discipline, and never applied as punishment for past misconduct." (*The Mary*, Gilpin, 31–32.) In *Jordan* v. *Williams* (1 Curt. C. Cls. 81), it is stated as settled, that it is not one of the ordinary powers of a shipmaster to imprison his men on shore.

The imprisonment inflicted on these men was without justification. The only excuse for it is the occurrence on the morning of the 1st of August, above detailed, which was not a very serious matter. The men were undoubtedly wrong in appearing in the cabin, and calling in question the master's right to punish the boy; for which, perhaps, there is some palliation in the fact that, while the crew doubtless knew that by the Prussian laws corporal punishment of seamen is not permitted, they may not have known that, by the same laws, "ship boys are subject to the parental chastisement of the master." The punishment of the boy, in this instance, was not cruel, and the men could not complain of some punishment inflicted on them for their appearance in the cabin, and their disrespectful language afterwards on deck. But there was nothing alarming in the temper of the crew; there had been no difficulty with them before this, and nothing occurred on this

day which any master of order, judgment and firmness would not have easily dealt with. No weapons were shown, no blows struck, no threats made, except that of reporting to the consul, and, if punishment was thought necessary, it should have been inflicted on board, and not by imprisonment in a foreign jail.

Neither does the master stand excused, if it be considered to have been shown that he really thought the men had left the ship, with intent to desert, for his whole conduct was unlawful. No law permits the imprisonment of deserters in our jails, except on proof of the facts before a competent tribunal. The Act of March 2d, 1829, which is the only statute enacted to render effective the provisions of Art. 11 of the treaty with Prussia, requires an application by the consul, with preliminary proofs, before a magistrate having competent jurisdiction, and the warrant of such magistrate for the arrest. The seamen can not be surrendered to the authority of the consul, until an examination be had before the magistrate, and the statement that the seaman is a deserter found to be true. And the arrest and detention of the seamen, in such cases, is not for punishment, but simply for safe-keeping until he can be sent back. Here the men were imprisoned, in the first instance, for a day and a night, upon the request of the master, without any of the preliminary proofs required by the statute, and without the interposition of the consul. And when, on the next day, the consul issued the requisition for an examination before a U. S. Commissioner, the master took it to the police justice, where it was used, apparently by way of inducement, for the imprisonment was then continued for some ten days, upon the complaint of the master, and not by virtue of the requisition. This imprisonment was, in law, the act of the master. He caused it to be done by a magistrate, known to him to be without jurisdiction. Nor can he protect himself by saying that he acted under the direction of the consul. The consul made no requisition upon the police justice, and never requested that officer to imprison the men, and his requisition is not alluded to in the commitment. He did direct somebody to release them, but it is not shown what person, other than the captain and the policeman, he so directed. It is also true that he paid the jail fees to the jailer, but there is evidence showing that his payment was for the account of the master.

If it be true, that a master is not responsible for an imprisonment inflicted by competent authorities, under the order of a consul (*The*

Coriolanus, Crabbe's R. 241; *Wilson* v. *The Mary,* Gilpin, 31; *Jordan* v. *Williams,* 1 Curt. C. Cls. 82), it is also true that he is responsible for an imprisonment inflicted, at his request, by a police justice without jurisdiction in the premises (*Snow* v. *Wope,* 2 Curt. C. Cls. 304).

In every aspect, then, the conduct of the master in respect to these men was unlawful, and, it appears to me, without excuse. Three of the men who have appeared before me, are men of intelligence, and of truthful appearance. The mate appears quite the equal of the master, and is, in fact, his connection by marriage. The difficulty arose in a port where there was every opportunity for protection, and for lawful investigation, and there was nothing requiring haste. Such an imprisonment, under such circumstances, I consider sufficient, within the principles of the adjudged cases, to dissolve the marines' contract, and sever the connection between the men and the vessel.

But it is said that the men contracted not to sue in a foreign country, and, therefore, this action can not be maintained. This position is based upon the words of the ship's articles or muster roll, which declare that "the seamen hire themselves on the above-mentioned vessel in accordance with the legal regulations printed in the book of Navigation." The book of Navigation referred to is a book which is furnished to every Prussian seaman, and which contains the name of the holder, with a description of his person, and memorandum of every shipment and every discharge of the holder, signed by the mustering authorities. The book contains also a printed appendix, where may be found certain extracts from the German mercantile law, among which extracts is this provision: "The seaman is not allowed to sue the master in a foreign court." Assuming that this provision of law is incorporated into the agreement, by the words used in the articles, and, therefore, to be considered as part of the contract, which is not entirely clear, the first answer is, that the provision, by its express terms, is made to relate to suits against the master, which this is not. Another answer is, that the master having, by his unlawful conduct in violation of his contract, absolved the men from their agreement, has absolved them from the whole of it, and this portion with the rest (*Schulenburg* v. *Wessels,* 2 E. D. Smith, R. 71).

In the English courts, a foreign statutory prohibition of this description had been considered not enforceable, unless incorporated as part of the contract (MacLachlan on Shipping, 226). In the American courts, it has been held that such a provision in the contract will not

be enforced, "where the voyage, as respects the seamen, is put an end to" (*The St. Oloff,* 2 Pet. Ad. 415); "where the interests of justice demand it" (*Barker* v. *Kloskyster,* Abb. Ad. 408); and "where the seamen are left destitute by an improper discharge." (*Id.* p. 408.)

Again, it is said that this is a Prussian vessel, and therefore the court is without jurisdiction in the premises by reason of the treaty between the United States and Prussia, ratified in 1828 (8 Stat. at Large, 382). This position, which has been urged upon my consideration with earnestness and ability, has received my careful consideration. The provision of the treaty is as follows: "The consuls, vice-consuls and commercial agents shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country, or the said consuls, vice-consuls or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

In considering the effect of this treaty in the present case, I remark first, that its language does not precisely cover an action *in rem* like the present.

Such an action is more than a mere difference between the master and the crew. It involves the question of lien upon the ship and her condemnation and sale to pay the same. In the absence of any express words, it is hard to infer that it was intended to confer upon consuls and vice-consuls, the power to direct a condemnation and sale of a ship—a proceeding which brings up, for determination, many questions besides those relating to seamen. Moreover, the statute of August 8, 1846, which was passed to render effective this provision of this treaty, confers upon the Commissioners of the Circuit Court full power, authority and jurisdiction to carry into effect the award, arbitration or decree of the consul, and for that purpose to issue remedial process, mesne and final, and to enforce obedience thereto by imprisonment. It certainly can not be supposed that it was the intention to give to the Commissioners of the Circuit Court power to make a decree *in rem*, and direct the sale of a ship. This position, that the

treaty is not applicable to the present case because it is a proceeding *in rem,* which did not strike me with much force upon the argument, has gained strength in my mind by reflection, and I confess that I am now inclined to the opinion that it is well taken; but I do not intend to rest my determination upon it. Nor do I discuss the position that the treaty was not intended to apply to any difference, except personal differences, between the master and the seamen alone, such as assaults and the like, and does not cover differences as to wages, to which the owners as well as the ship are always real parties.

But I pass on to consider whether the effect of this treaty is to prevent the Courts of Admiralty of the United States from taking cognizance of any action brought by seamen to recover wages earned by them on board of a Prussian vessel. At the outset, it appears strange to hear it contended that the jurisdiction of the District Courts of the United States is thus to be limited, because of an agreement arrived at between Prussia and our Government, as to the jurisdiction of our own courts. Courts are created and their jurisdiction fixed by the law-making power; and the extent of their jurisdiction does not appear to be a fit subject of an agreement with a foreign power. If, in any case, the powers exercised by the courts become a subject of discussion between our Government and a foreign nation, and any limitation of the jurisdiction, already conferred by law, be found to be desirable, the natural, if not the only way of accomplishing such a result would be by the action of the law-making power, instead of the treaty-making power. It appears reasonable, therefore, at least to require that an intention to accomplish such a result by a treaty, should be manifested by express words. The treaty under consideration contains no such definite provision. It simply declares that the consuls shall have the right to sit as judges and arbitrators in certain cases, without the interference of the local authorities, which is a very different thing from saying that the courts of the United States shall not have jurisdiction in such cases. Furthermore, the law-making power established the District Courts of the United States and the jurisdiction thereof, and gave to them, in civil cases of admiralty and maritime jurisdiction, all the judicial power vested in the national Government by the Constitution; and it is not to be lightly supposed that the President, acting with the advice of the Senate as the treaty-making power, has undertaken to repeal, *pro tanto,* an existing law relating to the jurisdiction of the courts, and to remove from the juris-

diction of the District Courts certain classes of actions, and that by reason of their subject-matter, for the provision in this treaty is not confined by its language to Prussian subjects, but applies to all seamen on Prussian vessels without regard to their nationality. It seems to me that no such intention should be imputed to the treaty, if any other can be discerned—and another, and a reasonable intention can be discerned when we consider, in connection with the treaty, the well-known practice of maritime courts in respect to actions brought by seamen to recover wages earned on foreign vessels. Such actions, Courts of Admiralty have long been accustomed to entertain, or to decline, in their discretion. Ordinarily, in the exercise of a sound discretion, they have refused to entertain such actions, when the consul of the foreign power shows reasonable grounds for such declination, and his willingness to determine the matter in controversy. (*The Nina,* W. & B. Ad. 180, n.)

Having this practice in view it may be well inferred, from the language used in this treaty, that the object of the provision in question was to insure, so far as possible, without a repeal of the existing law, a declination of such actions by the courts in all cases where the consul has acted, and perhaps also where he expresses a willingness to act, as judge or arbitrator between the parties—thus giving to the foreign nation the guarantee of this nation for the continued exercise, by the courts, of that sound discretion which has ordinarily been exercised, and committing the nation to answer any demand which might arise from any omission by its courts to exercise such a discretion in this class of cases. Such an effect given to the treaty appears to my mind to be reasonable and sufficient to accomplish all that was intended. To hold that the treaty repeals *pro tanto* the act establishing the District Courts, and ousts them of all jurisdiction in this class of cases, would permit consuls to refuse to act, and at the same time withhold from seamen—and American citizens, it may be—all right of resort to the courts of the land. It would give opportunity for great frauds, and open a wide door for the oppression of a class of men entitled by the maritime law, above all others, to the protection of maritime courts. Of the use which would be made of such a construction of the treaty, the present attempt, in violation of all law, to appropriate some $1,100 of the earnings of these men, is not a bad illustration.

Under the view of the treaty above indicated, I am thus brought to

consider whether the evidence sustains the averment, that the consul-general of Prussia has already cognizance as a judge or arbitrator of the demand of these seamen, and makes out a case where, for that reason, this court should decline to entertain the action.

The words "judge and arbitrator," used in the treaty, must be taken in their ordinary significance. They imply investigation of the facts upon evidence, the exercise of judgment as to the effect to be given thereto and a determination therefrom. And the use of these words indicate an intention not to deprive the seamen of a full and fair hearing of their cause and a decision thereof. If such a hearing had been given these men by the consul, the case would have been different. But here nothing has been done which can in any fair sense be called a hearing of the cause. The consul has not even gone through the form of sitting as judge or arbitrator in respect to the demands of these men. He examined no witnesses, he did not bring the parties before him, and he made no definite determination whatever. The men say that he refused to hear their story at all. The mate swears that he demanded to see the captain's charge against him, and he was refused. The vice-consul denies this, and says that he did listen to the men, and because they admitted themselves deserters, there was nothing to do but to tell them that they had forfeited their wages, which he did. But he can not say what persons admitted having deserted, and on cross-examination he shows that the admission was simply an admission by some, he does not know whom, of having left the vessel without leave. He admits having urged the men to go and see the captain, and expressed confidence that if they spoke civil the master would pay them their wages, which appears to be inconsistent with the idea that he had passed on the demand and adjudged the men not entitled to any wages whatever.

The consul is not a court, and neither his record nor his testimony is conclusive on this court. He can not shut his door in the face of parties and then, by declaring that he has adjudicated upon the demand, cut them off from a resort to the courts. Before he can call upon the courts to decline to entertain the action, he must show that he has given or is willing to give, to the seamen that hearing which the treaty intends they should have. Here the vice-consul himself testifies, "No adjudication was made in writing—a memorandum only was made. It was noted on the protocol as follows: 'A requisition has been made and given to the captain to be given to the court.'" The making such an entry is not sitting as judge or arbitrator on the present demand.

To hold, on such proof, that the vice-consul has acted as judge or as arbitrator in respect to this demand, would countenance a mode of procedure which I should be sorry to see obtain. My conclusion, therefore, is that there has been no such examination and adjudication of the matter in hand by the consul as the courts require and the treaty intends to secure.

In the absence then of any legal limitation of the jurisdiction of the court by the treaty, and in the absence of any proof of such action on the part of the consul as should call upon the court to decline to entertain the action, I deem it my duty to proceed to render a decree—and I do this the more willingly because the master of this vessel is half owner of her, and is here present, where also the seamen are—and because the ship is laid up here by reason of war, nor can it be told when, if ever, she will return to her home. It is a vain thing, therefore, to say to these sailors, who, although having some $1,100 of wages due, and unpaid, are left paupers, that they must go to Prussia, and there await the return of the ship in order to enforce their demand. If they can not now maintain this action, they are practically deprived of all remedy, and thrown upon this community penniless. Against such a result my sense of justice revolts, and I am unwilling to believe that it is compelled by the law. I, therefore, without hesitation, pronounce in this case the decree which the maritime law, applied to the facts, requires, and condemn the vessel to pay the wages of the men.

In considering this case thus far, I have treated the action of the vice-consul as equivalent to that of the consul, and have so spoken of it. In point of fact, Dr. Roesing, the consul-general who signed the requisition, which is the only official act proved, aside from the memorandum on the protocol, never saw either the master or the men, the vice-consul acting for him in everything, except signing the requisition. I have also spoken of the consul as the consul of Prussia, and have considered him to be the official referred to in the treaty with Prussia.

The point has been taken that the proofs show Dr. Roesing to be consul-general of the North German Union; that there are now no consuls of Prussia, nor any similar treaty with the North German Union. But it appears from the law, proved, that the consul of the North German Union is the consul of each power comprehended in the Union, which is a confederation rather than a Union. Besides, the executive department recognizes Dr. Roesing as the consul of Prussia, by virtue of his appointment as consul-general of the North

German Union, and the courts are bound by the action of the executive in such a matter, the question being political, and not judicial.

There remains to allude to the phase of the case which is presented by the fact that the libel is filed by Newman, the mate, to recover his own wages, and also the wages of the other men, as the assignee of their demands. So far I have treated the case as if all the men were parties libellant.

The evidence shows the execution of a formal assignment to the mate of the claims of the other men, but it also appears that the assignment was without consideration, and that the men all expect to receive whatever may be recovered as their wages. This mode of procedure to save multiplicity of suits seems to have been adopted in ignorance of the rule of the admiralty, which enables several seamen to join in one action; and the mate, upon the trial, filed a consent that the other men be now joined as colibellants, and receive in their own persons whatever might be awarded for their claims. Upon such a consent and such facts, I deem it competent to permit all the seamen to join in the action, upon petition to be made colibellants, and, on showing the cancellation of their assignments to the mate, to take a decree in their own names for the wages found due them. Two of them are minors, it is true, but, in the admiralty, minors who are mariners are permitted to sue for their wages in their own names. All seamen are in a certain sense treated as minors in maritime courts.

In accordance with these views, let a decree be entered in favor of the mate, for his wages earned in the services of this vessel, and still unpaid, with a reference to ascertain the amount, and let similar decrees be made in favor of the seamen, upon the filing of their petition, and showing the cancellation of their assignments to the mate.

For Libellants, *D. McMahon.*

For Claimant, *E. Salomon.*

EX PARTE NEWMAN[1]

Certain Prussian sailors libelled a Prussian vessel in New York in admiralty for wages, less in amount than $2.000. The master set up a provision in a treaty of the United States with Prussia, by which it was stipulated that the consuls of the respective countries should sit as judges in "differences between the crews and captains of vessels" belonging to their respective countries; and the consul of Prussia, coming into the District Court, pro-

[1] 81 U. S. 152. (Dec. 1871.)

tested against the District Court's taking jurisdiction. The District Court, however, did take jurisdiction, and decreed $712 to the sailors. On appeal the Circuit Court reversed the decree, and dismissed the libel because of the consul's exclusive jurisdiction. *Held*, that mandamus would not lie to the Circuit judge to compel him to entertain jurisdiction of the cause on appeal, and to hear and decide the same on the merits thereof; and that this conclusion of this court was not to be altered by the fact that owing to the sum in controversy being less than $2,000, no appeal or writ of error from the Circuit Court to this court existed.

PETITION for writ of mandamus to the United States Circuit judge for the Eastern District of New York; the case being thus:

The Constitution ordains[1] that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

The 10th article of the treaty of the United States with the King of Prussia, made May 1st, 1828,[2] contains this provision:

> The consuls, vice-consuls, and commercial agents shall have the right as such to sit as judges, and arbitrators *in such differences* as may arise between *the captains and crews of the vessels* belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country; or the said consuls, vice-consuls, or commercial agents, should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the rights they have to resort on their return to the judicial authority of their country.

"All treaties made, or which shall be made, under the authority of the United States," it is ordained by the Constitution of the United States,[3] "shall be the supreme law of the land."

With this treaty thus in force, the mate and several of the crew, all Prussians—who had shipped in Prussia on the Prussian bark *Elwine Kreplin*, under and with express reference, made in the shipping articles, to the laws of Prussia—got into a difficulty at New York with the master of the bark, who caused several of them to be arrested on charges of mutiny and desertion. They, on the other hand, took

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[1] Article 3, Sec 2.

[2] 8 Stat. at Large, p. 378.

[3] Article 6.

the case before the Prussian consul; denying all fault on their part, and claiming wages. The vice-consul heard the case, and decided that on their own showing they had forfeited their wages by the Prussian law applied to their contract of shipment. In addition to this he issued a requisition addressed to any marshal or magistrate of the United States, reciting that the master and crew had been guilty of desertion, and requiring such marshal or magistrate to take notice of their offence.

The mate and men now filed a libel in the District Court at New York against the bark for the recovery of wages (less than $2,000), which they alleged were due to them; and the bark was attached to answer. The master of the bark intervening for the interest of the owners answered, and set up various grounds of defence to the claim, some of which arose under the laws of Prussia, and especially he invoked the protection of the clause in the above quoted treaty between his country and this, and denied the jurisdiction of the District Court, alleging, moreover, that the matter in difference, the claim of the libellants for wages, had already in fact been adjudicated by the Prussian consul at the port of New York.

Before the cause was tried in the District Court, the consul-general of the North German Union presented to that court his formal protest against the exercise of jurisdiction by that court in the matter in difference.* He invoked therein the same clause in the treaty, and claimed exclusive jurisdiction of such matters in difference; and declared also that, before the filing of the libel the matter had been adjudicated by him, and insisted that his adjudication was binding between the parties, and could only be reviewed by the judicial tribunals of Prussia.

The District Court proceeded notwithstanding to hear and adjudge the case; placing its right to do this, on the ground that the suit before *it* was a proceeding *in rem* to enforce a maritime lien upon the vessel itself, and not a "difference between the captain and crew;" and, also, because the Prussian consul had no power to conduct and

*The consul-general of the North German Union was commissioned by the King of Prussia, Prussia being one of the States composing the North German Union; and by certificate of the Secretary of State of the United States, under the seal of that department, it appeared that the Executive Department of the United States recognizes the consuls of the North German Union as consuls of each one of the sovereign States composing that Union, "the same as if they had been commissioned by each one of such States."

carry into effect a proceeding *in rem* for the enforcement of such a lien, and had not in fact passed at all and could not pass upon any such case. Accordingly after a careful examination of the facts, that court decreed in favor of the libellants $712. The case then came by appeal to the Circuit Court. This latter court considered that the District Court had given to the treaty too narrow and technical a construction. The Circuit Court said:

> The master is the representative in this port of the vessel and of all the interests concerned therein. He is plainly so regarded in the treaty. The matter in difference in this cause is the claim for wages. That arises between the crew and the master, either as master or as the representative here of vessel and owners. The lien and the proceeding *in rem* against the vessel appertain only to the remedy. The very first step in this cause is to settle the matter in dispute. If the claim be established, then, as incident to the right to the wages, the lien and its enforcements against the vessel follow. The District Court can have no jurisdiction of the lien, nor jurisdiction to enforce it if it has no jurisdiction of the difference or dispute touching the claim for wages. To hold that the jurisdiction of the consul is confined to cases in which there is no maritime lien, and in which no libel of the vessel could, apart from the treaty, be maintained, is to take from the treaty much of its substance.

The Circuit Court adverted to and relied on the fact, that the Prussian consul had moreover actually heard the mate and sailors, and pronounced against them.

The Circuit Court accordingly, while it expressed on a general view of the merits its sympathy with the sailors, and a strong inclination to condemn the conduct of the master in the matter, yet was "constrained to the conclusion that the treaty required that the matter in difference should have been left where the treaty with Prussia leaves it, viz., in the hands and subject to the determination of their own public officer." The result was the dismissal of the libels by the Circuit Court for want of jurisdiction.

Thereupon Newman and the others, by their counsel, *Messrs. P. Phillips and D. McMahon*, filed a petition in *this* court for a writ of mandamus to the Circuit judge, commanding him "to entertain jurisdiction of the said cause on appeal, and to hear and decide the same on the merits thereof." The judge returned that the Circuit Court had entertained the appeal, and had heard counsel on all the ques-

tions raised in the case, and had decided it; and that the said court had decided that the matter in controversy was within the jurisdiction of the consul under the treaty, and that in the exercise of the jurisdiction so given him, he had decided the matter, and that therefore the court had dismissed the libel.

The question now was whether the mandamus should issue.

The reader will of course remember the provision in the 13th section of the Judiciary Act, by which it is enacted:

> That the Supreme Court shall have power to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States.

And also the provision of the 22d section, extended by an act of 1803 to appeals in admiralty, by which it is enacted:

> That final judgments and decrees in civil actions . . . in a Circuit Court . . . removed there by appeal from a District Court, where the matter in dispute exceeds the sum or value of $2,000, exclusive of costs, may be reexamined and reversed or affirmed in the Supreme Court.

Messrs. D. McMahon and P. Phillips, in support of the motion:

The mandamus should issue:

1st. Because the treaty stipulation is unconstitutional. It strips the courts of the United States of the admiralty jurisdiction conferred on them by the Constitution of the United States. It is well settled that admiralty courts have jurisdiction, at their discretion, over foreign vessels within their jurisdiction, and actions *in rem* against them brought by foreign seamen. If then the treaties attempt to confer on a foreign officer exclusive jurisdiction of cases already within the control of admiralty, they violate the Constitution, and are so far null.

2d. The treaty with Prussia has no reference to suits or proceedings *in rem*, and in that respect differs from the case mentioned in the treaty, of a difference between the master and seamen. The proceeding is against the vessel to foreclose a lien, and the owners are brought in incidentally. The master, as such, has no interest, nominal or otherwise, in the suit in question, and it is a misnomer to call the present case a controversy between a master and his crew.

3d. The Prussian consul made no adjudication in the matter *now* in difference, between the libellants and the master.

4th. The treaty is with the kingdom of Prussia, and the tribunals referred to in it are the consuls, vice-consuls, and commercial agents of that government. Now, at the time of the occurrence of the facts here in controversy, there were no consuls, or vice-consuls, or commercial agents of the kingdom of Prussia in the city of New York, or in the United States, though there are such officers of the North German Union. A treaty stipulation to maintain tribunals independent of our own, in this country, is contrary to the spirit of our institutions, as its effect may be to create in our midst many tribunals independent of our national courts. It should, therefore, be construed strictly.

5th. The consul is estopped from asserting his exclusive jurisdiction, because that he appealed in his "requisition" to our marshals and other magistrates, and prayed them to take cognizance of the case. He can not be permitted after doing so, to avail himself of the benefit of the treaty stipulations.

Messrs. Salomon and Burke, contra:

This is an attempt to cause this court to review the decision already rendered in the Circuit Court and to direct the Circuit judge to change his decision, and to render a different judgment in a case which can not be brought before this court by appeal, because the amount in controversy is less than $2,000. This can not be done.

Mandamus can not perform the functions of a writ of error or of an appeal. This court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but will only, in a proper case, require the inferior court to decide. If the Circuit judge had refused to decide the case, or to enter a decree therein, this court might compel him by mandamus to decide or to enter a decree; but even then it could not by such process have commanded him how to decide it, or what decree to enter. A revision of his judicial decision can only take place by appeal. But here the applicants do not complain that the judge has refused to decide the case, or that he has refused to enter judgment, but they complain that his decision upon some of the questions involved therein, and which were fully argued before, and have been carefully considered and adjudged by him, is

erroneous, and that consequently this court should overrule his judgment in this case.

Now, strictly speaking, this court can not look into the opinion of the Circuit judge for the purpose of ascertaining on what ground his decision is based with a view of revising it.

It can look only to the record, which shows only that the Circuit Court has entertained the appeal, heard and tried it, and upon such hearing and trial, after due consideration, has ordered that the decree of the District Court be reversed and the libel dismissed. How can this court, then upon an application for a mandamus, compel him to decide differently?

But, waiving this, no doubt the question arising under the treaty with Prussia has from the beginning been the material question in the controversy. That under the treaty the Prussian consul had exclusive jurisdiction, and had exercised that jurisdiction and decided between the parties, was set up by the claimant in his answer; it was brought before the District Court by the consul's protest; upon that, mainly, the appeal was taken to the Circuit Court. The question involved not only the proper construction of the treaty, but also the examination and adjudication of important facts and circumstances relating to the consul's action in the case. All the points were argued before the Circuit Court, and that court, after consideration, has decided upon the facts and the law. This is in no proper sense a case in which the Circuit Court has refused to entertain or to exercise jurisdiction. It has, in fact, entertained the appeal from the decree of the District Court, and upon consideration has decided that the decree appealed from should be reversed, on three grounds:

First. That under the treaty with Prussia, the Prussian consul had jurisdiction of the matter in difference involved in the litigation.

Second. That that jurisdiction of the Prussian consul was exclusive.

Third. Upon the proofs the court found and decided, that the Prussian consul *had* adjudicated the matter in difference involved in the litigation, and that the libellants were bound by that adjudication.

If this court can by mandamus review this decision of the Circuit Court, then it can in this manner review every case in which a suit is dismissed on the ground of a former adjudication of the subject-matter between the same parties.

Admiralty courts generally decline to interfere between foreigners concerning seamen's wages, except where it is manifestly necessary to do so to prevent a failure of justice, and then only where the voyage has been broken up, or the seamen have been discharged.* Now, if for this reason, in the proper exercise of his judicial discretion, the Circuit judge, on appeal, had ordered a dismissal of the libel, can it be maintained that by mandamus this court could compel him to reverse his own decision? *Non constat* that, if the Circuit judge had not ordered the dismissal of the libel on account of the treaty and the exercise of the consular jurisdiction, he would not have so ordered on this ground of comity between nations.

The application is for a mandamus directing the Circuit judge to hear the appeal and to decide the same on the merits thereof. What are the *merits* of the controversy? Is not this question of the jurisdiction of the Prussian consul and his decision a part of them? Will this court, by mandamus, determine what is and what is not of "the merits of a controversy?

Reply: The law will leave no one remediless, and the amount in controversy not being $2,000, and no appeal existing, and there being no other remedy, the remedy in the premises must be by mandamus. The writ is issued to inferior courts to enforce the due exercise of these judicial powers; "and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice."[1] While this court will not restrain nor direct by mandamus in what manner the discretion of the inferior tribunal should be exercised, it will, in proper cases, require the court to hear and decide. The "principles and usages of law," give the right to a mandamus where a party has a legal right, and no other remedy to enforce it.[2]

In the case at bar the proposed mandamus does not usurp the functions of a writ of error or appeal, for no appeal lies, the amount being less than $2,000.

The case is this. The Circuit judge refuses to consider and determine, on the merits, a cause over which he has ample jurisdiction, he entertaining the opinion that he has no jurisdiction, because of the

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*_Gonzales_ v. _Minor_, 2 Wallace, Jr., 348.

[1]_Ex parte Bradley_, 7 Wallace, 375.

[2]Phillips's Practice, 230.

terms of treaty with Prussia, In this court it is submitted that his conclusion is erroneous. No appeal, however, lies. A Circuit judge entertaining very strict notions of the extent of admiralty jurisdiction, might, in a contest between State and National courts, paralyze the commerce of a great commercial port like New York. Can there be no correction for this? Is a party to be dismissed in a case like this, with the allegation that the writ of mandamus can not usurp the function of a writ of error, therefore there is no correction?

While it is conceded that the writ of mandamus can not be used to correct an erroneous judgment of a court of acknowledged jurisdiction, yet it can be invoked to compel a court to exercise its jurisdiction, even though such court be of the opinion it had not jurisdiction. The distinction between the two classes of cases is obvious. The distinction lies between a direction to an inferior tribunal to act, and direction to it how to act. We do not seek to control the Circuit Court's judgment by the mandamus, but only to compel it to entertain jurisdiction of the cause, and then to hear and decide according to the law and the allegations and proofs.

Authorities are clear on the right of a superior tribunal to compel an inferior tribunal to hear a cause and decide it even after the latter has declined to entertain the cause because of an alleged want of jurisdiction.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Attempt was made in the first place to prosecute the suit in the name of the mate for himself and as assignee of the crew, but the court before entering the decree suggested an amendment, and the crew were admitted as colibellants, which will render it unnecessary to make any further reference to that feature of the pleadings.

Proceedings *in rem* were instituted in the District Court against the bark Elwine Kreplin, by the mate, for himself and in behalf of the crew of the bark, on the twenty-fourth of August, 1870, in a case of subtraction of wages civil and maritime, and they allege in the libel, as amended, that the bark is a Prussian vessel, and that they are Prussian subjects, and that they were hired by the master and legally shipped on board the bark for a specified term of service, and that they con-

*_Rex_ v. _Justices of Kent_, 14 East, 395; _Hull_ v. _Supervisors of Oneida_, 19 Johnson, 260; _Judges of Oneida County_ v. _The People_, 18 Wendell, 92 and 95.

tinued well and truly to perform the duties they were shipped to fulfil, and that they were obedient to the lawful commands of the master, until they were discharged. They also set forth the date when they were shipped, the length of time they had served, the wages they were to receive, and the amount due and unpaid to them respectively for their services, and aver that the owners of the bark refuse to pay the amount.

Process was issued and served by the seizure of the bark, and the master appeared, as claimant, and filed an answer. He admits that the appellants shipped on board the bark at the place and in the capacities and for the wages alleged in the libel, but he avers that they signed the shipping articles and bound themselves by the rules, regulations, and directions of the shipping law and rules of navigation of the country to which the bark belonged, and he denies that they well and truly performed their duties, or that they were obedient to his lawful commands. On the contrary, he alleges that they, on the day they were discharged, were guilty of gross insubordination and mutinous conduct, that they resisted the lawful commands of the master, and refused to obey the same, and interfered with him in the performance of his duty, and with force and threats prevented him from performing the same, and thereafter, on the same day, deserted from the vessel.

Apart from the merits he also set up the following defences:

1. That the court had no jurisdiction of the matter contained in the libel, because the bark was a Prussian vessel, owned by Prussian citizens, and because the libellants were Prussian subjects belonging to the crew of the vessel, and were also citizens of that kingdom.

Support to that defence is derived from the tenth article of our treaty with that government, which provides that consuls, vice-consuls, and commercial agents of the respective countries, in the ports of the other, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country, or the consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect *

*8 Stat. at Large, 382.

He set up that provision of the treaty, and prayed that he might have the same advantage of it as if the same was separately and formally pleaded to the libel.

2. That the libellants in signing the shipping articles bound themselves, under the penalty of a forfeiture of wages, not to sue or bring any action for any cause, against the vessel, or the master, or owners thereof, in any court or tribunal except in those of Prussia.

3. That the consul-general of the North German Union, resident in the city of New York, which Government included Prussia and other sovereignties, heard and examined the questions of difference between the libellants and the claimant and adjudicated the same; that the libellants appeared before the court on the occasion and presented their claim to be discharged and their claim for wages, and that the consul, in his character as such, heard and examined their said claims and adjudged that the libellants should return to the vessel, and that no wages were due them or would be due them until they complied with the contract of shipment.

Testimony was taken in the District Court, and the District Court entered a decree in favor of the libellants for the amount due them for their wages, and referred the cause to a commissioner to ascertain and report the amount. Subsequently he reported that the amount due to the libellants was seven hundred and forty-three dollars and forty-one cents. Exceptions were filed by the claimant, and the District Court upon further hearing reduced the amount to seven hundred and twelve dollars and thirty-two cents, and entered a final decree for that amount, with costs of suit. Thereupon the claimant appealed to the Circuit Court, and the record shows that the appeal was perfected, and that the cause was duly entered in that court.

On the fifth of the last month the petition under consideration was filed in this court in behalf of the appellees in that suit, in which they represented that the cause appealed was fully argued before the Circuit Court on the same pleadings and proofs as those exhibited in the District Court, and that the Circuit judge reversed the decree of the District Court and dismissed the libel for want of jurisdiction in the District Court to hear and determine the controversy; that the Circuit judge declined to entertain the cause or to consider the same on the merits, and that no final decree on the appeal has been entered in the Circuit Court or signed by the Circuit judge.

His refusal to entertain jurisdiction and to hear and decide the

merits of the case was placed, as they allege, upon the ground that the matter in difference, under the tenth article of the treaty, was within the exclusive cognizance of the consul, vice-consul, or commercial agent therein described, and in consequence thereof that the District Court was without any jurisdiction, which they contend is an error for the following reasons:

(1.) Because the treaty stipulation, if so construed, is unconstitutional and void.

(2.) Because that article of the treaty applies only to disputes between the masters and crews of vessels, and has no reference to suits *in rem* against the vessel.

(3.) Because the record in this case shows that the Prussian authorities refused to entertain jurisdiction of the controversy.

(4.) Because the treaty is with Prussia, and it appears that her government has no consul, vice-consul, or commercial agent at that port.

(5.) Because that the consul who acted in the case requested the District Court to take jurisdiction of the matter in difference.

Hearing was had on the day the petition was presented, and this court granted a rule requiring the Circuit judge to show cause on the day therein named why a peremptory writ of mandamus should not issue to him directing him to hear the appeal of the petitioners and decide the same on the merits. Due service of that rule was made, and the case now comes before the court upon the return of the judge to that rule. He returns, among other things not necessary to be reproduced, as follows: That the cause of the libellants proceeded to a decree in their favor in the District Court; that an appeal from that decree was taken in due form to the Circuit Court for that district; that the Circuit Court did not refuse to entertain the appeal nor did the Circuit Court refuse to decide the case on the appeal nor hold or decide that the Circuit Court had no jurisdiction to hear or decide the same, as required by the proofs or by the law. On the contrary, the Circuit Court did entertain the appeal, did hear the counsel of the parties fully on all the questions raised in the case, and did decide the same. But in making such decision the said court did hold and decide that the matter in controversy was within the jurisdiction of the consul, under the treaty, and that the consul, in the exercise of that jurisdiction, after hearing the parties, had decided the matter. Pur-

suant to those views the Circuit Court, as the return shows, did thereupon direct that the decree of the District Court be reversed, and that the libel of the petitioners be dismissed.

Power to issue writs of mandamus to any courts appointed under the authority of the United States was given to this court by the thirteenth section of the Judiciary Act, in cases warranted by the principles and usages of law.* When passed, the section also empowered the court to issue such writs, subject to the same conditions, to persons holding office under the United States, but this court, very early, decided that the latter provision was unconstitutional and void, as it assumed to enlarge the original jurisdiction of the court, which is defined by the Constitution.[1]

Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to reexamine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.[2] Where a rule is laid, as in this case, on the judge of a subordinate court, he is ordered to show cause why the peremptory writ of mandamus shall not issue to him, commanding him to do some act which it is alleged he has power to do, and which it is his duty to do, and which he has improperly neglected and refused

*1 Stat. at Large, 81.

[1]*Marbury* v. *Madison*, 1 Cranch, 175; *Ex parte Hoyt*, 18 Peters, 290.

[2]*Insurance Co.* v. *Wilson*, 8 Peters, 302; *United States* v. *Peters*, 5 Church, 135; *Ex parte Bradstreet*, 7 Peters, 648; *Ex parte Many*, 14 Howard, 24; *United States* v. *Lawrence*, 3 Dallas, 42; *Commissioner* v. *Whitely*, 4 Wallace, 522; *Insurance Co.* v. *Adams*, 9 Peters, 602.

to do, as required by law. Due service of the rule being made the judge is required to make return to the charge contained in the rule, which he may do by denying the matters charged or by setting up new matter as an answer to the accusations of the relator, or he may elect to submit a motion to quash the rule or to demur to the accusative allegations. Matters charged in the rule and denied by the respondent must be proved by the relator, and matters alleged in avoidance of the charge made, if denied by the relator, must be proved by the respondent.[1] Motions to quash in such cases are addressed to the discretion of the court, but if the respondent demurs to the rule, or if the relator demurs to the return the party demurring admits everything in the rule or the return, as the case may be, which is well pleaded, and if the relator elects to proceed to hearing on the return, without pleading to the same in any way, the matters alleged in the return must be taken to be true to the same extent as if the relator had demurred to the return.[2] Subordinate judicial tribunals, when the writ is addressed to them, are usually required to exercise some judicial function which it is alleged they have improperly neglected or refused to exercise, or to render judgment in some case when otherwise there would be a failure of justice from a delay or refusal to act, and the return must either deny the facts stated in the rule or alternative writ on which the claim of the relator is founded, or must state other facts sufficient in law to defeat the claim of the relator, and no doubt is entertained that both of those defences may be set up in the same return, as in the case before the court.[3] Several defences may be set up in the same return, and if any one of them be sufficient the return will be upheld.[4]

Evidently the District judge was inclined to adopt the proposition, advanced by the libellants, that the suit for wages, as it was prosecuted by a libel *in rem*, was not within the treaty stipulation, nor a contro-

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[1]Angell & Ames on Corporations, 9th ed. Sec. 727; *Cagger* v. *Supervisors*, 2 Abbott's Practice, N. S. 78.

[2]Tapping on Mandamus, 347; Moses on Mandamus, 210; *Com. Bank* v. *Commissioners*, 10 Wendell, 25; *Ryan* v. *Russel*, 1 Abbott's Practice, N. S. 230; *Hanahan* v. *Board of Police*, 26 New York, 316; *Middleton* v. *Commissioners*, 37 Pennsylvania State, 245; 3 Stephens's *Nisi Prius*, 2326; 6 Bacon's Abridgment, ed. 1856, 447.

[3]*Springfield* v. *Harnden*, 10 Pickering, 59; *People* v. *Commissioners*, 11 Howard's Practice, 89; *People* v. *Champion*, 16 Johnson, 61.

[4]*Wright* v. *Fawcett*, 4 Burrow, 2041; Moses on Mandamus, 214.

versy within the jurisdiction of the consul, but he did not place his decision upon that ground. He did, however, rule that the treaty did not have the effect to change the jurisdiction of the courts, except to require them to decline to hear matters in difference between the masters and crews of vessels in all cases where the consul had acted or perhaps was ready to act as judge or arbitrator in respect to such differences. Beyond doubt he assumed that to be the true construction of the treaty, and having settled that matter he proceeded to inquire whether the consul had adjudicated the pending controversy, or whether the evidence showed that he was ready to do so, and having answered those inquiries in the negative he then proceeded to examine the pleadings and proofs, and came to the conclusion in the case which is expressed in the decree from which the appeal was taken to the Circuit Court.

All of those matters were again fully argued in the Circuit Court, and the Circuit judge decided to reverse the decree of the District Court upon the following grounds: (1.) That the Prussian consul, under the treaty, had jurisdiction of the subject-matter involved in the suit in the District Court. (2.) That the jurisdiction of the consul under the treaty was exclusive. (3.) That the proofs showed that the consul heard and adjudicated the matter involved in the suit appealed to the Circuit Court, and that the libellants were bound by that adjudication.

Such questions were undoubtedly raised in the pleadings, and it is equally certain that they were decided by the District Court in favor of the libellants. Raised as they were by the pleadings, it can not be successfully denied that the same questions were also presented in the Circuit Court, and in view of the return it must be conceded that they were decided in the latter court in favor of the respondent. Support to that proposition is also found in the opinion of the Circuit judge, and in the order which he made in the case. Suffice it, however, to say, it so appears in the return before the court, and this court is of the opinion that the return, in the existing state of the proceedings, is conclusive.

Confessedly the petitioners are without remedy by appeal or writ of error, as the sum or value in controversy is less than the amount required to give that right, and it is insisted that they ought on that account to have the remedy sought by their petition. Mandamus will not lie, it is true, where the party may have an appeal or writ of error.

but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or writ of error. Such remedies are not given save in patent and revenue cases, except when the sum or value exceeds two thousand dollars, but the writ of mandamus will not lie in any case to a subordinate court unless it appears that the court of which complaint is made refused to act in respect to a matter within the jurisdiction of the court and where it is the duty of the court to act in the premises.

Admiralty courts, it is said, will not take jurisdiction in such a case except where it is manifestly necessary to do so to prevent a failure of justice, but the better opinion is that, independent of treaty stipulation, there is no constitutional or legal impediment to the exercise of jurisdiction in such a case. Such courts may, if they see fit, take jurisdiction in such a case, but they will not do so as a general rule without the consent of the representative of the country to which the vessel belongs, where it is practicable that the representative should be consulted. His consent, however, is not a condition of jurisdiction, but is regarded as a material fact to aid the court in determining the question of discretion, whether jurisdiction in the case ought or ought not to be exercised.*

Superior tribunals may by mandamus command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed. If the duty is unperformed and it be judicial in its character the mandate will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be done, or if it be ministerial, the mandamus will direct the specific act to be performed.[1]

Power is given to this court by the Judiciary Act, under a writ of error, or appeal, to affirm or reverse the judgment or decree of the Circuit Court, and in certain cases to render such judgment or decree as the Circuit Court should have rendered or passed, but no such power is given under a writ of mandamus, nor is it competent for the superior tribunal, under such a writ, to reexamine the judgment or decree

*2 Persons on Shipping, 224; *Lynch* v. *Crowder*, 2 Law Reporter, N. S. 355; *Thompson* v. *Nanny*, Bee, 217; *The Bee*, Ware, 332; *The Infanta*, Abbott's Admiralty, 263.

[1]*Carpenter* v. *Bristol*, 21 Pickering, 258; Angell & Ames on Corporations, 9th ed., Sec. 720.

of the subordinate court. Such a writ can not perform the functions of an appeal or writ of error, as the superior court will not, in any case, direct the judge of the subordinate court what judgment or decree to enter in the case, as the writ does not vest in the superior court any power to give any such direction or to interfere in any manner with the judicial discretion and judgment of the subordinate court.[1]

Viewed in the light of the return, the court is of the opinion that the rule must be discharged and the

Petition denied.

Case No. 4,426

THE ELWINE KREPLIN[2]

[9 Blatchf. 438][3]

Circuit Court, E. D. New York. Feb. 23, 1872.[4]

CONSTITUTIONAL LAW—EFFECT OF EXPRESS PROVISIONS OF FOREIGN TREATY UPON JURISDICTION OF LOCAL COURTS

Article 10 of the treaty between the United States and the king of Prussia, of May 1, 1828 (8 Stat. 378, 382), provides, that the consuls, vice-consuls and commercial agents of each party "shall have the right, as such, to sit as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels belong to the nation whose interests are committed to their charge, without the interference of the local authorities," subject to the right of the contending parties "to resort, on their return, to the judicial authority of their country," and to the right of the consuls, vice-consuls or commercial agents to require the assistance of the local authorities, "to cause their decisions to be carried into effect or supported." The crew of a Prussian vessel sued her *in rem*, in admiralty, in the district court, to recover wages alleged to be due to them. The master of the vessel answered, denying the debt, invoking the protection of said treaty, denying the jurisdiction of the court, and averring that the claim for wages had already been adjudicated by the Prussian consul at New York. The consul also protested formally to the

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[1] *Ex parte Crane*, 5 Peters, 194; *Ex parte Bradstreet*, 7 *Id.* 634; *Insurance Co.* v. *Wilson*, 8 *Id.* 304; *Ex parte Many*, 14 Howard, 25.

[2] 8 Federal Cases, 588.

[3] [Reported by Hon. Samuel Blachford, District Judge, and here reprinted by permission.]

[4] [Reversing The Elwine Kreplin, Case No. 4,427.]

court against the exercise of its jurisdiction. The case was tried in the district court, and it appeared that the consul had adjudicated on the claim for wages. The district court decreed in favor of the libellants: *Held,* that the district court had no jurisdiction of the case.

[Cited in *The Belgenland* v. *Jensen,* 114 U. S. 364, 5 Sup. Ct. 864; *Re Aubrey,* 26 Fed. 851; *Davis* v. *The Burchard,* 42 Fed. 608; *The Welhaven,* 55 Fed. 81.]

[Appeal from the district court of the United States for the eastern district of New York.]

[This was a case of subtraction of wages, instituted by Max Newman, the chief mate of the Prussian bark *Elwine Kreplin,* to recover the sum of $173, amount of wages due; also $1,158, the aggregate amount of the wages of the crew, which he claimed to recover as assignee. In the district court a decree was given in favor of the mate (Case No. 4,427), whereupon this appeal is prosecuted.]

Dennis McMahon, for libellants.
Edward Salomon, for claimants.

WOODRUFF, Circuit Judge. By the tenth article, of the treaty made by the United States with the king of Prussia, on the 1st of May, 1828 (8 Stat. 378, 382), it is provided, that "the consuls, vice-consuls, and commercial agents,"—which each of the parties to the treaty is declared entitled to have in the ports of the other—"shall have the right, as such, to sit as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities. * * * It is, however, understood, that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country." To this general rule there is a qualification: "Unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country, or the said consuls, vice-consuls, or commercial agents should require their assistance" (the assistance of the local authorities), "to cause their decisions to be carried into effect or supported." This treaty is, by the constitution of the United States, the law of the land, and the courts of justice are bound to observe it. When a case arises which is within this provision of the treaty, jurisdiction thereof belongs to the consul, vice-consul or commercial agent of the nation whose interests are committed to his charge, and with the exercise of that jurisdiction the local tribunals

are not at liberty to interfere, unless such consul, vice-consul, or commercial agent requires their assistance, to cause their decision to be carried into effect or supported.

In the present case, the mate and several of the crew of the barque *Elwine Kreplin* prosecuted their libels against the vessel, in the district court, for the recovery of wages alleged to be due to them, which the master of the vessel denied to be due, upon various grounds; and the vessel was attached to answer. The master of the barque, intervening for the interest of the owner, sets up, in his answer, various grounds of defence to the claim, some of which arise under the laws of Prussia; and, especially, he invokes the protection of the treaty above-mentioned, and denies the jurisdiction of the district court, alleging, moreover, that the matter in difference—the claim of the libellants for wages—has already, in fact, been adjudicated by the Prussian consul at the port of New York. Before the cause was tried in the district court, the consul-general of the North German Union presented to the district court his formal protest against the exercise of jurisdiction by that court in the matter in difference. He invoked therein the treaty above referred to, and claimed exclusive jurisdiction of such matter in difference; and he also declared, that, before the filing of the libel, the said matter had been adjudicated by him, and insisted that his adjudication was binding between the parties, and could only be reviewed by the judicial tribunals of Prussia.

The barque is a Prussian vessel, the mate and crew are Prussian seamen, who shipped in Prussia, under and with express reference to the laws of Prussia, referred to in the shipping articles, and it should be assumed, that the treaty which binds this nation and its citizens and seamen, binds also Prussia and her subjects and seamen. The consul-general of the North German Union is commissioned by the king of Prussia, and, by certificate of the secretary of state of the United States, under the seal of that department, it appears, that the executive department of the United States recognizes the consuls of the North German Union as consuls of each one of the sovereign states composing that Union, "the same as if they had been commissioned by each one of such states." The kingdom of Prussia is one of the states composing the North German Union. The treaty does not require that the consuls, vice-consuls, &c., should bear any specific name. It is sufficient, that the "interests" of Prussia "are committed

to their charge," and quite sufficient, that the government of the United States, by its executive, recognizes the consul as consul of the kingdom of Prussia.

The discussion of the case at the hearing on the appeal, was, on the part of the libellants, very largely devoted to the merits of the claim for wages, upon principles applicable, it may be, to the subject, if no such treaty was in force, and under decisions of our courts in reference to the rights and duties of seaman and master, the effect of the misconduct of either upon the obligation of the other, for the purpose of showing that the treatment of the libellants by the master exonerated them from their duty to serve according to the terms of the shipping articles, and also from all others of its stipulations, even from such as arise from the laws of Prussia forming a part of the terms, stipulations, and conditions which enter into the relation of the crew to the master and owners, and to the vessel. That discussion was very full, and was presented, in argument, with great ability, by the counsel for the libellants. With most of the rules of the law invoked by the counsel, when considered apart from and independent of any treaty stipulation, the claimants have no contest; and they are, no doubt, settled, by the cases cited. But the prior question of jurisdiction must be determined, before it is competent even to enquire into the merits of the libellants' claim to recover their wages.

In the first instance, it would seem clear, that a claim of the crew of a Prussian vessel to recover wages which the master of the vessel either denied to be due, or refused to pay, was, par eminence, a matter in difference between the captain and crew, which, by the very terms of the treaty, the Prussian consul or vice-consul had jurisdiction, as judge or arbitrator, to determine, "without the interference" of the courts of this country; and such jurisdiction, when it exists, is, by such terms as these, exclusive. It is, however, claimed, that the present cause is not at all embraced within the treaty, for the reason, that it is a proceeding *in rem*, to enforce a maritime lien upon the vessel itself, and not a difference between the captain and crew; and, also, because the Prussian consul has no power to conduct and carry into effect a proceeding *in rem* for the enforcement of such a lien.

The treaty can receive no such narrow and technical construction. The master is the representative, in this port, of the vessel, and of all the interests concerned therein. He is plainly so regarded in the treaty. The matter in difference in this cause is the claim for wages.

That arises between the crew and the master, either as master, or as the representative here of vessel and owners. It is precisely that which is in litigation in this case. The lien, and the proceeding *in rem* against the vessel, appertain to the remedy, and only to the remedy. The very first step in this cause is to settle the matter in dispute. If the claim be established, then, as incident to the right to the wages, the lien and its enforcement against the vessel follow. The district court can have no jurisdiction of the lien, nor jurisdiction to enforce it, if it has no jurisdiction of the difference or dispute touching the claim for wages. To hold that the jurisdiction of the consul is confined to cases in which there is no maritime lien, and in which no libel of the vessel could, apart from the treaty, be maintained, is to take from the treaty very much of its substance. The existence of any lien, and of any right to charge the vessel, is in difference here. To say, that the treaty gives the consul jurisdiction of claims against the master *in personam*, and does not include a claim to remove the vessel itself from his custody, as the owner *pro hac vice*, or as the representative of all the interests therein, that the voyage may be broken up, and the vessel sold for the wages of the crew, and that an effort, by judicial proceeding, to do this, is not included in the terms, a difference arising between captain and crew, seems to me to destroy the very substance of the stipulation, and defeat its obvious purpose, to confine both masters and crews of Prussia to the rights and obligations of the Prussian laws, and compel obedience to its mandates. And, be it observed, the treaty gives the same protection to, and requires the like obedience by, the masters and crews of vessels of the United States. It does not add to the legal reasons for this view, but, if a vessel of the United States were sold in a port in Prussia, to pay the wages of its crew, alleged by the master not to be payable, and in repudiation of any right of the United States consul at that port to act as judge or arbitrator upon that claim, it would, at least, stimulate our quickness of apprehension to discover, and would incline us to insist, that the treaty intended to protect our shipowners against the application of foreign laws, and the decisions of foreign courts, to our vessels and the relations of the master and crews thereof.

To the suggestion, that the consul has no power to enforce the maritime lien, and cause the vessel to be sold, to satisfy the wages, if he should find that wages are due and payable, it is sufficient to say, that the treaty has been deliberately entered into, and has become the law for both nations. Each preferred to employ its own officers. The

power given to consuls to act as judge or arbitrator is not made final. The parties have the right of resort to the tribunals of their own country, without being concluded by the decisions of the consul. This was deemed a sufficient protection, and to afford, for the time being, a sufficient remedy to both master and crew; and it is not for this court to say, that the remedy here, by attachment of the vessel, will be more efficient and useful, and, on that ground, to apply it. Besides, this court can not know that the remedy by resort to the vessel is not, if it exists, so regulated in Prussia, that it was intended that her seamen should not invoke against the vessel the remedies permitted by our laws, under the mode of administration and rules of decision by which our courts are governed. And, further, under the expressed exception, which permits resort to local tribunals by consuls, &c., who may require their assistance to cause their decisions to be carried into effect or supported, it is plausible, at least, to say, that, if the consul decide, on a difference between captain and crew, that wages are payable, the power of the court to attach and condemn the vessel for their payment may be invoked to support and give effect to such decision.

Again, it is said, that, in this case, the captain and crew were not confronted before the counsel, witnesses were not examined, no adjudication in writing was made, but the consul only orally declared his judgment of the matter in difference, after hearing the statement of the master and the statement of the libellants, and then declared that he had nothing further to do therein. The proceeding does not, it is true, conform to our ideas of the requisites of a judicial proceeding; but, are the courts of this country to prescribe to the Prussian consul the forms and modes of proceeding which he must adopt when he acts as a judge or arbitrator between master and crew under this treaty? Must he follow the practice, and be governed by the rules, governing trials and arbitrations under our laws? Must our consuls in Prussia follow the rules and practice of the courts of that kingdom? If so, then the district court here was sitting as a court of error, to review the judgment or award of the Prussian consul. What can this court say are the formal requisites of a Prussian arbitration? It is manifest, by the reservation of the right to resort to the judicial tribunals of the home country, without being concluded by the decision of the consul, that the proceeding before him as an arbitrator or judge was intended to be summary, and its conduct left very much in his discretion; and, especially, it is manifest, that the nations respectively in-

tended to confide in their consul, and temporarily entrust to him the adjustment of differences between officer and crew of their vessel in the port of the other, and it was not intended that the courts of such other nation should sit in judgment upon the form or regularity, or the justice, of the acts of the consul, or interfere therewith in any manner. It was deemed safe and proper to leave to such consuls this temporary administration of the interests of their seamen abroad, assured that they would act with fairness and integrity therein, but yet giving the right of full and final investigation and adjudication at home, where home laws, home remedies, and home modes of investigation could be resorted to. The district court here not only passed upon the requisites of the proceeding as judicial, or as an arbitrament, but assumed to inquire into the details of the evidence, and the truth of the declared grounds upon which the vice-consul testified that he acted, and which he says were before him in the admissions of the crew—thus, in effect, reviewing the law and the facts which the consul made the basis of his decision.

It is claimed, that the consul did not act as judge or arbitrator to determine this case, and that, he not having taken jurisdiction, a proceeding in our courts is no interference in disregard of the treaty. It is by no means clear, that the attachment of the vessel, on the libel of the crew, is not, in itself, such an interference as precludes the action of the consul. But in this case, the argument disregards the clearly established fact, that the consul or his vice-consul (who is, in terms, included in the treaty, and whose acts in the matter the consul recognizes), did hear the parties respectively. On the statement of the case by the crew (who, whichsoever of them was the first speaker, had the opportunity to tell their story), he pronounced against them. On their own story, he decided that they had forfeited their wages, by the Prussian law, applied to their contract of shipment; and, afterwards, when this suit was commenced, he formally represents to the court, that he had already adjudicated the matter in difference, and claimed that his jurisdiction for that purpose is exclusive of the courts of this country. It was after such declaration of his decision to the crew, that he, knowing that the vessel was laid up, advised them to see the captain, and, by civil and conciliatory deportment, induce him to waive the forfeiture and pay the wages which had accrued. In the situation in which the vessel and her master then were, it is obvious, that, if the men had forfeited their wages (of which I here express

no opinion), their acts had wrought no great harm, the captain had no present need of the services of so many, and many considerations might properly have moved him to pay their wages and let them go. The advice of the consul indicated that he thought the loss of their service was no inconvenience to the captain and, even if wrong theretofore, they had claims to his consideration, while destitute and in a foreign country, which might and, perhaps, ought to induce him to pay their wages. This is all there is of the argument, that the consul himself regarded the crew as practically discharged.

I do not propose to examine the merits of the libellants' claim for wages. That they were, on the requisition of the consul, and without sufficient grounds therefor, held in prison as deserters, is most probable. That their departure from the vessel, and going ashore without leave, and against the will of the master (save as to one, who had his consent), is not desertion by our law, unless it was done without the intention to return, is, no doubt, true. That the master did not, in fact, consent to the discharge of any of them, is, I think, clear, while I think it in the highest degree probable, that, if this difficulty had not arisen, he would, in view of the laying up of the vessel, have consented to part with most of them.

I do not think it certain, that an imprisonment, on the requisition of the consul, though induced by a statement of the facts by the captain, operated to discharge the seamen from their articles, even though the imprisonment was not warranted by the facts. *Jordan* v. *Williams* [Case No. 7,528]. Nor is it certain that, under this treaty, and the act of March 2, 1829 (4 Stat. 359), a state magistrate can have no jurisdiction to arrest and detain a seaman charged as a deserter. True, the laws of the United States may not make it the duty of a state judge to act; but it does not follow, that, if he is included in the law, his acts will be without authority. There are many powers conferred upon state magistrates by the laws of the United States, which, if executed, are valid. Whether such magistrate is bound to accept the authority and act upon it, is another question. The act of 1829, in determining the duty, confers the power on "any court, judge, justice, or other magistrate having competent power, to issue warrants" to arrest, &c. See Pars. Shipp. & Adm. 102; *Kentucky* v. *Dennison*, 24 How. [65 U. S.] 66, 107, 108. It is apparent, that the requisition was given to the master to be delivered to the justice at Staten Island, who, as the captain informed the consul, then detained

the seamen; and if, as stated by counsel (though it does not appear as printed in the copy proofs handed to me), it was addressed to "any magistrate," &c., the power of the magistrate is not clearly wanting.

But all these and other questions go to the merits. They bear on the broad question, whether, under the terms of the shipping articles, and the Prussian rules contained in the navigation book, &c., the seamen had a right to their wages. The effect of the stipulation not to sue in a foreign country, which appears to be one of those rules, also, and what amounts to a discharge from the contract, actual or constructive, are questions on the merits; and the sympathy, which the condition of these men, penniless in a foreign land, whether with or without fault on their part, must awaken in every mind susceptible of human emotion, strongly inclines to a condemnation of the conduct of the master in this matter.

But I am constrained to the conclusion, that the treaty required that this matter in difference should have been left where, I think, the treaty with Prussia leaves it—in the hands, and subject to the determination, of their own public officer. The necessary result is the dismissal of the libels.

[NOTE. An application was afterwards made to the supreme court for a mandamus to compel the circuit court to pass upon the merits, but it was denied.]

UNITED STATES v. DIEKELMAN[1]

1. Unless treaty stipulations provide otherwise, a merchant vessel of one country visiting the ports of another for the purpose of trade, is, so long as she remains, subject to the laws which govern them.
2. Where, in time of war, a foreign vessel, availing herself of a proclamation of the President of May 12, 1862, entered the port of New Orleans, the blockade of which was not removed, but only relaxed in the interests of commerce, she thereby assented to the conditions imposed by such proclamation that she should not take out goods contraband of war, nor depart until cleared by the collector of customs according to law.
3. As New Orleans was then governed by martial law, a subject of a foreign power entering that port with his vessel under the special license of the proclamation became entitled to the same rights and privileges accorded under the same circumstances to loyal citizens of the United States. Restrictions placed upon them operated equally upon him.

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[1] 92 U. S. Reports, 520.

4. Money, silver-plate, and bullion, when destined for hostile use or for the purchase of hostile supplies, are contraband of war. In this case, the determination of the question whether such articles, part of the outward-bound cargo of the vessel, were contraband, devolved upon the commanding general at New Orleans. Believing them to be so, he, in discharge of his duty, ordered them to be removed from her, and her clearance to be withheld until his order should be complied with.
5. Where the detention of the vessel in port was caused by her resistance to the orders of the properly constituted authorities whom she was bound to obey, she preferring such detention to a clearance upon the conditions imposed,—*Held*, that her owner, a subject of Prussia, is not "entitled to any damages" against the United States, under the law of nations or the treaty with that power. 8 Stat. 384.

Appeal from the Court of Claims.

Mr. Assistant Attorney-General Edwin B. Smith for the appellant.

Mr. J. D. McPherson, contra.

Mr. Chief Justice Waite delivered the opinion of the court.

This suit was brought in the Court of Claims under the authority of a joint resolution of both Houses of Congress, passed May 4, 1870, as follows:

> That the claim of E. Diekelman, a subject of the King of Prussia, for damages for an alleged detention of the ship "Essex" by the military authorities of the United States at New Orleans, in the month of September, 1862, be and is hereby referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found to be entitled to any damages.

Before this resolution was passed, the matter of the claim had been the subject of diplomatic correspondence between the governments of the United States and Prussia.

The following article, originally adopted in the treaty of peace between the United States and Prussia, concluded July 11, 1799 (8 Stat. 168), and revived by the treaty concluded May 1, 1828 (8 Stat. 384), was in force when the acts complained of occurred, to wit:

> Art. XIII. And in the same case, if one of the contracting parties, being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition and military stores of every kind, no such articles carried in the

> vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

When the *Esser* visited New Orleans, the United States were engaged in the war of the rebellion. The port of that city was, at the very commencement of the war, placed under blockade, and closed against trade and commercial intercourse; but, on the 12th of May, 1862, the President, having become satisfied that the blockade might "be safely relaxed with advantage to the interests of commerce," issued his proclamation, to the effect that from and after June 1 "commercial intercourse, * * * except as to persons, things, and information contraband of war," might "be carried on subject to the laws of the United States, and to the limitations, and in pursuance of the regulations * * * prescribed by the Secretary of the Treasury," and appended to the proclamation. These regulations, so far as they are applicable to the present case, are as follows:

> 1. To vessels clearing from foreign ports and destined to * * * New Orleans, * * * licenses will be granted by consuls of the United States upon satisfactory evidence that the vessels so licensed will convey no persons, property, or information contraband of war either to or from the said ports; which licenses shall be exhibited to the collector of the port to which said vessels may be respectively bound, immediately on arrival, and, if required, to any officer in charge of the blockade: and on leaving either of said ports every vessel will be required to have a clearance from the collector of the customs according to law, showing no violation of the conditions of the license. 12 Stat. 1264.

The *Essex* sailed from Liverpool for New Orleans June 19, 1862, and arrived August 24. New Orleans was then in possession of the military forces of the United States, with General Butler in command. The city was practically in a state of siege by land, but open by sea, and was under martial law.

The commanding general was expressly enjoined by the Government of the United States to take measures that no supplies went out of the port which could afford aid to the rebellion; and, pursuant to this injunction, he issued orders in respect to the exportation of money, goods, or property, on account of any person known to be friendly to the Confederacy, and directed the custom-house officers to inform him whenever an attempt was made to send any thing out which might be the subject of investigation in that behalf.

In the early part of September, 1862, General Butler, being still in command, was informed that a large quantity of clothing had been bought in Belgium on account of the Confederate government, and was lying at Matanoras awaiting delivery, because that government had failed to get the means they expected from New Orleans to pay for it; and that another shipment, amounting to a half million more, was delayed in Belgium from coming forward, because of the non-payment of the first shipment. He was also informed that it was expected the first payment would go forward through the agency of some foreign consuls; and this information afterwards proved to be correct.

He was also informed early in September by the custom-house officers, that large quantities of silver-plate and bullion were being shipped on the *Essex*, then loading for a foreign port, by persons, one of whom had declared himself an enemy of the United States, and none of whom would enroll themselves as friends; and he thereupon gave directions that the specified articles should be detained, and their exportation not allowed until further orders.

On the 15th September, the loading of the vessel having been completed, the master applied to the collector of the port for his clearance, which was refused in consequence of the orders of General Butler, but without any reasons being assigned by the collector. The next day, he was informed, however, that his ship would not be cleared unless certain specified articles which she had on board were taken out and landed. Much correspondence ensued between General Butler and the Prussian consul at New Orleans in reference to

the clearance, in which it was distinctly stated by General Butler that the clearance would not be granted until the specified goods were landed, and that it would be granted as soon as this should be done. Almost daily interviews took place between the master of the vessel and the collector, in which the same statements were made by the collector. The master refused to land the cargo, except upon the return of his bills of lading. Some of these bills were returned, and the property surrendered to the shipper. In another case, the shipper gave an order upon the master for his goods, and they were taken away by force. At a very early stage in the proceeding, the master and the Prussian consul were informed that the objection to the shipment of the articles complained of was that they were contraband.

A part only of the goods having been taken out of the vessel, a clearance was granted her on the 6th of October, and she was permitted to leave the port and commence her voyage.

Upon this state of facts, the Court of Claims gave judgment for Diekelman, from which the United States took an appeal.

One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own Government.

His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.

In this case, Diekelman, claiming to have been injured by the alleged wrongful conduct of the military forces of the United States, made his claim known to his Government. It was taken into consideration, and became the subject of diplomatic correspondence between the two nations. Subsequently, Congress, by joint resolution,

referred the matter to the Court of Claims "for its decision according to law." The courts of the United States were thus opened to Diekelman for this proceeding. In this way the United States have submitted to the Court of Claims, and through that court upon appeal to us, the determination of the question of their legal liability under all the circumstances of this case for the payment of damages to a citizen of Prussia upon a claim originally presented by his sovereign in his behalf. This requires us, as we think, to consider the rights of the claimant under the treaty between the two Governments, as well as under the general law of nations. For all the purposes of its decision, the case is to be treated as one in which the Government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law, which the two Governments have agreed might be instituted for that purpose. We shall proceed upon that hypothesis.

1. As to the general law of nations.

The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty. *The Exchange* v. *McFaddon*, 7 Cranch, 116. When the *Essex* sailed from Liverpool, the United States were engaged in war. The proclamation under which she was permitted to visit New Orleans made it a condition of her entry that she should not take out goods contraband of war, and that she should not leave until cleared by the collector of customs according to law. Previous to June 1, she was excluded altogether from the port by the blockade. At that date the blockade was not removed, but relaxed only in the interests of commerce. The war still remained paramount, and commercial intercourse subordinate only. When the *Essex* availed herself of the proclamation and entered the port, she assented to the conditions imposed, and can not complain if she was detained on account of the necessity of enforcing her obligations thus assumed.

The law by which the city and port were governed was martial law. This ought to have been expected by Diekelman when he despatched his vessel from Liverpool. The place had been wrested from the possession of the enemy only a few days before the issue of the proclamation, after a long and desperate struggle. It was, in fact, a

garrisoned city, held as an outpost of the Union army, and closely besieged by land. So long as it remained in the possession of the insurgents, it was to them an important blockade-running point, and after its capture the inhabitants were largely in sympathy with the rebellion. The situation was, therefore, one requiring the most active vigilance on the part of the general in command. He was especially required to see that the relaxation of the blockade was not taken advantage of by the hostile inhabitants to promote the interests of the enemy. All this was matter of public notoriety; and Diekelman ought to have known, if he did not in fact know, that although the United States had to some extent opened the port in the interests of commerce, they kept it closed to the extent that was necessary for the vigorous prosecution of the war. When he entered the port, therefore, with his vessel, under the special license of the proclamation, he became entitled to all the rights and privileges that would have been accorded to a loyal citizen of the United States under the same circumstances, but no more. Such restrictions as were placed upon citizens, operated equally upon him. Citizens were governed by martial law. It was his duty to submit to the same authority.

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed. New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown. General Butler, in command, was the military ruler. His will was law, and necessarily so. His first great duty was to maintain on land the blockade which had theretofore been kept up by sea. The partial opening of the port toward the sea, made it all the more important that he should bind close the military lines on the shore which he held.

To this law and this Government the *Essex* subjected herself when she came into port. She went there for gain, and voluntarily assumed all the chances of the war into whose presence she came. By availing herself of the privileges granted by the proclamation, she, in effect, covenanted not to take out of the port "persons, things, or information contraband of war." What is contraband depends upon circumstances. Money and bullion do not necessarily partake of that character; but, when destined for hostile use or to procure hostile supplies, they do. Whether they are so or not, under the circum-

stances of a particular case, must be determined by some one when a necessity for action occurs. At New Orleans, when this transaction took place, this duty fell upon the general in command. Military commanders must act to a great extent upon appearances. As a rule, they have but little time to take and consider testimony before deciding. Vigilance is the law of their duty. The success of their operations depends to a great extent upon their watchfulness.

General Butler found on board this vessel articles which he had reasonable cause to believe, and did believe, were contraband, because intended for use to promote the rebellion. It was his duty, therefore, under his express instructions, to see that the vessel was not cleared with these articles on board; and he gave orders accordingly. It matters not now whether the property suspected was in fact contraband or not. It is sufficient for us that he had reason to believe, and in fact did believe, it to be contraband. No attempt has been made to show that he was not acting in good faith. On the contrary, it is apparent, from the finding of the court below, that the existing facts brought to his knowledge were such as to require his prompt and vigorous action in the presence of the imminent danger with which he was surrounded. Certainly, enough is shown to make it necessary for this plaintiff to prove the innocent character of the property before he can call upon the United States to respond to him in damages for the conduct of their military commander, upon whose vigilance they relied for safety.

Believing, then, as General Butler did, that the property was contraband, it was his duty to order it out of the ship, and to withhold her clearance until his order was complied with. He was under no obligation to return the bills of lading. The vessel was bound not to take out any contraband cargo. She took all the risks of this obligation when she assumed it, and should have protected herself in her contracts with shippers against the contingency of being required to unload after the goods were on board. If she failed in this, the consequences are upon her, and not the United States. She was operating in the face of war, the chances of which might involve her and her cargo in new complications. She voluntarily assumed the risks of her hazardous enterprise, and must sustain the losses that follow.

Neither does it affect the case adversely to the United States that the property had gone on board without objection from the custom-house officers or the military authorities. It is not shown that its

character was known to General Butler or the officers of the custom-house before it was loaded. The engagement of the vessel was not to leave until she had been cleared according to law, and that her clearance might be withheld until with reasonable diligence it could be ascertained that she had no contraband property on board. This is the legitimate effect of the provisions of the treasury regulations, entitling her to a license "upon satisfactory evidence" that she would "convey no persons, property, or information contraband of war, either to or from" the port; and requiring her not to leave until she had "a clearance from the collector of customs, according to law, showing no violation of the license." Her entry into the port was granted as a favor, not as a right, except upon the condition of assent to the terms imposed. If the collector of customs was to certify that the license she held had not been violated, it was his duty to inquire as to the facts before he made the certificate. Every opportunity for the prosecution of this inquiry must be given. Under the circumstances, the closest scrutiny was necessary. If, upon the examination preliminary to the clearance, prohibited articles were found on board, there could be no certificate such as was required, until their removal. It would then be for the vessel to determine whether she would remove the goods and take the clearance, or hold the goods and wait for some relaxation of the rules which detained her in port as long as she had them on board. General Butler only insisted upon her remaining until she removed the property. She elected to remain. There was no time when her clearance would not have been granted if the suspected articles were unloaded.

We are clearly of the opinion that there is no liability to this plaintiff resting upon the United States under the general law of nations.

2. As to the treaty.

The vessel was in port when the detention occurred. She had not broken ground, and had not commenced her voyage. She came into the waters of the United States while an impending war was flagrant, under an agreement not to depart with contraband goods on board. The question is not whether she could have been stopped and detained after her voyage had been actually commenced, without compensation for the loss, but whether she could be kept from entering upon the voyage and detained by the United States within their own waters, held by force against a powerful rebellion, until she had complied

with regulations adopted as a means of safety, and to the enforcement of which she had assented, in order to get there. In our opinion, no provision of the treaties in force between the two Governments interferes with the right of the United States, under the general law of nations, to withhold a custom-house clearance as a means of enforcing port regulations.

Art. XIII of the treaty of 1828 contemplates the establishment of blockades, and makes special provision for the government of the respective parties in case they exist. The vessels of one nation are bound to respect the blockades of the other. Clearly the United States had the right to exclude Prussian vessels in common with those of all other nations, from their ports altogether, by establishing and maintaining a blockade while subduing a domestic insurrection. The right to exclude altogether necessarily carries with it the right of admitting through an existing blockade upon conditions, and of enforcing in an appropriate manner the performance of the conditions after admission has been obtained. It will not be contended that a condition which prohibits the taking out of contraband goods is unreasonable, or that its performance may not be enforced by refusing a clearance until it has been complied with. Neither, in the absence of treaty stipulations to the contrary, can it be considered unreasonable to require goods to be unloaded, if their contraband character is discovered after they have gone on board. In the existing treaties between the two Governments there is no such stipulations to the contrary. In the treaty of 1799, Art. VI is as follows: "That the vessels of either party, loading within the ports or jurisdiction of the other, may not be uselessly harassed or detained, it is agreed that all examinations of goods required by the laws shall be made before they are laden on board the vessel, and that there shall be no examination after." While other articles in the treaty of 1799 were revived and kept in force by that of 1828, this was not. The conclusion is irresistible, that the high contracting parties were unwilling to continue bound by such a stipulation, and, therefore, omitted it from their new arrangement. It would seem to follow, that, under the existing treaty, the power of search and detention for improper practices continued, in time of peace even, until the clearance had been actually perfected and the vessel had entered on her voyage. If this be the rule in peace, how much more important is it in war for the prevention of the use of friendly vessels to aid the enemy.

Art. XIII of the treaty of 1799, revived by that of 1828, evidently has reference to captures and detentions after a voyage has commenced, and not to detentions in port, to enforce port regulations. The vessel must be "stopped" in her voyage, not detained in port alone. There must be "captors;" and the vessel must be in a condition to be "carried into port" or detained from "proceeding" after she has been "stopped," before this article can become operative. Under its provisions the vessel "stopped" might "deliver out the goods supposed to be contraband of war," and avoid further "detention." In this case there was no detention upon a voyage, but a refusal to grant a clearance from the port that the voyage might be commenced. The vessel was required to "deliver out the goods supposed to be contraband" before she could move out of the port. Her detention was not under the authority of the treaty, but in consequence of her resistance of the orders of the properly constituted port authorities, whom she was bound to obey. She preferred detention in port to a clearance on the conditions imposed. Clearly her case is not within the treaty. The United States, in detaining, used the right they had under the law of nations and their contract with the vessel, not one which, to use the language of the majority of the Court of Claims, they held under the treaty "by purchase" at a stipulated price.

As we view the case, the claimant is not "entitled to any damages" as against the United States, either under the treaty with Prussia or by the general law of nations.

The judgment of the Court of Claims is, therefore, reversed, and the cause remanded with directions to dismiss the petition.

NORTH GERMAN LLOYD S. S. CO. v. HEDDEN, COLLECTOR[1]

[Same v. Magone, Collector]

(*Circuit Court, D. New Jersey.* May 21, 1890)

1. *Customs Duties—Construction of Laws—Tonnage Tax.*

Act Cong. June 26, 1884, sec. 14, which levies a duty of 3 cents per ton on all vessels "from any foreign port or place in North America, Central

[1] 43 Fed. Rep. 17.

America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the Sandwich Islands, or Newfoundland," and a duty of 6 cents per ton on vessels from other foreign ports, does not entitle German vessels sailing from European ports to enter our ports on payment of a duty of 3 cents per ton, under the treaties of December 20, 1827, and May 1, 1828, which stipulate that the United States shall not grant any particular favor regarding commerce or navigation to any other foreign nation which shall not immediately become common to Germany, since the discrimination contained in said act is merely geographical, and the 3-cent rate applies to vessels of all nations coming from the privileged ports.

2. *Treaties—Effect of Inconsistent Act of Congress.*

Where an Act of Congress is in conflict with a prior treaty the Act must control, since it is of equal force with the treaty and of later date.

3. *Constitutional Law—Commissioner of Navigation.*

Act Cong. July 5, 1884, sec. 3, which makes final the decision of the commisioner of navigation on all questions "relating to the collection of tonnage tax, and to the refunding of such tax, when collected erroneously or illegally," is constitutional.

At Law.

Samuel F. Bigelow and *Henry C. Nevitt*, for plaintiff.
Howard W. Hayes, Asst. U. S. Dist. Atty., for defendants.

WALES, J. The plaintiff, a duly organized corporation under the laws of the Hanseatic Republic of Bremen, which is a part of the German empire, is the owner of a line of ocean steamships, plying regularly between the ports of Bremen and New York, and brings these actions, under section 2931, Rev. Stats. U. S., to recover the amount of certain tonnage dues, alleged to have been unlawfully collected from said ships during the period extending from June 26, 1884, to July 28, 1888, and while the defendants were successively collectors of customs at the last named port. The vessels cleared from Bremen for New York via Southampton, England, stopping at or near the latter place temporarily, to discharge cargo and passengers, and to take on board additional cargo, passengers, and mails. The consignees of the vessels paid the dues, in every instance, under protest, and the plaintiff appealed to the Secretary of the Treasury, and finally, at the suggestion of the latter officer and with the concurrence of the department of justice, brought these actions to determine the authority of the defendants. The right of the plaintiff to recover depends upon the following statement of the law and facts: Prior to

the Act of Congress of June 26, 1884, entitled "An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade," tonnage tax was imposed upon German and all other vessels arriving in the United States from foreign ports, at the rate of 30 cents per ton per annum, and up to July 1st, of that year, it had been collected in a lump sum for a year at a time. But section 14 of the Act of 1884 changed the rate and mode of collection as follows:

> That in lieu of the tax on tonnage of thirty cents per ton per annum heretofore imposed by law, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the Sandwich Islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports. 23 U. S. Stats. 57.

This section was amended by section 11 of the Act of Congress of June 19, 1886, entitled "An Act to abolish certain fees," etc. 24 U. S. Stats. 81. The amendment consisted in adding the following words to those just quoted:

> Not, however, to include vessels in distress or not engaged in trade; provided, that the President of the United States shall suspend the collection of so much of the duty herein imposed on vessels entered from any foreign port as may be in excess of the tonnage and lighthouse dues, or other equivalent tax or taxes, imposed in said port on American vessels, by the Government of the foreign country in which such port is situated, and shall, upon the passage of this Act, and from time to time thereafter as often as it may become necessary, by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage duty, if any, to be collected under such suspension; provided further, that such proclamation shall exclude from the benefits of the suspension herein authorized, the vessels of any foreign country in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels of the country in which such port is situated, or on the cargoes of such vessels; and sections 4223

> and 4224 and so much of section 4219 of the Revised Statutes as conflict with this section are hereby repealed.

Section 4219, title 48, chap. 3, Rev. Stats., referred to in the foregoing sub-proviso, provides that "nothing in this section shall be deemed * * * to impair any rights * * * under the law and treaties of the United States relative to the duty of tonnage vessels." Section 4227 of the same title and chapter is in these words:

> Nothing contained in this title shall be deemed in any wise to impair any rights and privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States, relative to the duty on tonnage of vessels, or any other duty on vessels.

By article 9 of the treaty of December 20, 1827, between the United States and the Hanseatic Republics, "the contracting parties * * * engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party." Public Treaties, 400. Article 9 of the Prussian-American treaty of May 1, 1828, (Public Treaties, 656,) contains a like stipulation. These treaties have been held by both the American and German Governments to be valid for all Germany. On the 26th of January, 1888, the President, in virtue of the authority vested in him by section 11 of the Act of June 19, 1886, issued his proclamation, wherein, after reciting that he had received satisfactory proof that no tonnage or lighthouse dues, or any equivalent tax or taxes whatever, are imposed upon American vessels entering the ports of the German Empire, either by the imperial Government or by the Government of the German maritime states, and that vessels belonging to the United States are not required, in German ports, to pay any fee or due of any kind or nature, or any import duty higher or other than is payable by German vessels or their cargoes, did "declare and proclaim that from and after the date of this my proclamation shall be suspended the collection of the whole of the duty of six cents per ton * * * upon vessels entered in the ports of the United States from any of the ports of the empire of Germany. * * * and the suspension hereby declared and proclaimed shall continue so long as the reciprocal exemption of vessels belonging to citizens of the United States and their cargoes shall be continued in the said ports of the empire of Germany, and no longer." The com-

missioner of navigation, in his circular letter No. 19, dated February 1, 1888, and approved by the Secretary of the Treasury, addressed to the collectors of customs and others, decided that the President's proclamation does not apply to vessels which entered before the date of the proclamation, and that only those German vessels "arriving directly from the ports of the German empire may be admitted under the proclamation without the payment of the dues therein mentioned." The commissioner of navigation claims authority to make this decision by virtue of section 3 of the Act of Congress of July 5, 1884, entitled "An Act to constitute a bureau of navigation in the Treasury Department," which reads as follows:

> That the commissioner of navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation, growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refunding of such tax when collected erroneously or illegally, his decision shall be final.

The plaintiff's vessels were German vessels, and on the 19th day of June, 1886, and thereafter until now, the Government of Germany exacted no tonnage tax or taxes whatever on vessels of the United States arriving in German ports.

Upon this statement of the law and the facts, the plaintiff's counsel contend (1) that as to the dues collected between June 26, 1884, and June 19, 1886, the plaintiff's vessels should not have been charged more than the lower rate of tonnage tax fixed by the Act of 1884, under the favored nation clause of the treaties, whereas the defendants charged six cents per ton; (2) that the dues collected after the passage of the Act of June 19, 1886, and prior to the President's proclamation, were excessive, for the same reason; (3) that no tonnage tax whatever could be lawfully collected of the vessels of the plaintiff, after the passage of the Act of June 19, 1886, because that Act went into effect immediately, and without waiting for the President's proclamation; (4) that the act of July 5, 1884, in so far as it confers on the commissioner of navigation the power of deciding finally on all questions of interpretation, growing out of the execution of the laws relating to the collection of tonnage tax, and the refund of the

same when illegally or erroneously collected, is unconstitutional and void.

As introductory to their argument, plaintiff's counsel referred to the policy of our Government in relation to the subject of navigation, which it is claimed has been from the beginning to establish entire reciprocity with other nations. The practice has been to ask for no exclusive privileges and to grant none, "but to offer to all nations and to ask from them entire reciprocity in navigation." 1 Kent, Comm. 34, note. This policy has been judicially recognized by the Supreme Court in *Oldfield* v. *Marriott,* 10 How. 146; and it is asserted that Congress had it in view in enacting the Acts of 1884 and 1886, imposing the tonnage taxes. The review presented by counsel of the legislative and diplomatic correspondence touching this subject is historically interesting and instructive, and would be persuasive in the case of a doubtful meaning of an Act of Congress, but it cannot be held to affect the interpretation of laws which are plain and unambiguous in their terms. The questions before the court must be determined by the ordinary and well-settled rules applicable to the construction of and validity of statutes.

Soon after the passage of the Act of June 26, 1884, claims were presented by the Government of Germany, and of other foreign powers, having similar treaty stipulations with the United States, in relation to navigation for the benefit of the three-cent rate of tax, under the favored nation clause. The claims having been referred to the Department of Justice, the attorney general, on the 19th of September, 1886, gave the following opinion:

> The discrimination as to tonnage duty in favor of vessels sailing from the regions mentioned in the act, and entered in our ports, is, I think, purely geographical in character, inuring to the advantage of any vessel of any power that may choose to fetch and carry between this country and any port embraced by the fourteenth section of the Act. I see no warrant, therefore, to claim that there is anything in the most "favored nation clause" of the treaty between this country and the powers mentioned that entitles them to have the privileges of the fourteenth section extended to their vessels sailing to this country from ports outside of the limitations of the act.

The construction thus given to the statute is clearly consistent with its terms, which grant the privilege of the minimum tax to all vessels entered in United States from certain specified foreign ports, and not

exclusively to the vessels of nations to whom those ports belong, or in whose territories the ports are situate, excepting the vessels of those governments only which, in the imposition of tonnage taxes, discriminate against American vessels. In accordance with this construction, it follows that no particular favor is conferred on any nation, and that, with the exception noted, the vessels of all nations coming from the privileged ports are entered in the United States on an equal footing. Further discussion on this point would seem, therefore, to be fruitless; but it may be proper to observe that the construction of both the act of June 26, 1884, and that of June 19, 1886, and the complicated questions growing out of the claims of foreign governments, for the lower rate of tonnage tax by virtue of their treaty rights, were brought to the attention of congress by the President's message of January 14, 1889, transmitting a report of the Secretary of State in reference to the international questions arising from the imposition of differential tonnage dues upon vessels entering the United States from foreign countries. Ex. Doc-House Rep., 50th Cong., 3d Sess. The report, after mentioning the claims of the German minister for a reduction of the tax under the Act of 1884, and for a proper refund of the dues charged on German ships entering the United States from German ports since the date of the act of 1886, stated: "To this suggestion the undersigned was unable to respond, the matter being one for the consideration of Congress. But the request assuredly deserves equitable consideration." In respect to the claim now made by the plaintiff, that the course of its ships coming from Bremen to New York by the way of Southampton is not such as to deprive the run of its character of a voyage from a German port to a port in the United States, within the meaning of the Act of 1886, the report says:

> But it has been held by the commissioner of navigation that the voyage can not be so regarded, and that the vessels must pay dues as coming from Southampton, a British port. Similar rulings have been made in respect to other vessels of different nationality.

And the report further adds:

> Another instance of complication is that of a vessel starting from, we will say, a 6–30 cent port, and calling on her way to

> the United States at a 3–15 cent port, and a free port. Other combinations will readily suggest themselves, and the need not be stated. But in each case the vessel is required to pay the highest rate, without reference to the amount of cargo obtained at the various ports from which she comes. Thus a penalty may practically be imposed in many cases on indirect voyages. It is conceived that in many instances the main purpose of the Act may be defeated by these rulings, but it must be admitted that the law contains no provision to meet such cases. * * * This appears to be a proper subject for the consideration of Congress.

From an examination of the above extracts from his report, it will be seen that the Secretary of State was of the opinion that the questions referred to were to be addressed to the political, and not to the judicial, branch of the government, and that Congress alone could be looked to for the redress of the class of wrongs complained of by the plaintiff, and to prevent their repetition. The plaintiff's counsel deny the correctness of the construction given to the act of 1884 by the attorney general, and insist that the difference in tonnage rates, by which certain ports specially named in the act are favored, is a particular favor to the countries to which those ports belong, "in respect to their commerce and navigation" which *ipso facto* accrues, in pursuance of treaty right, to German vessels coming from German ports. It is also asserted that the treaty stipulations with Germany are paramount to the later Acts of Congress, and that the former can not be annihilated by the latter. Admitting for the moment that the attorney general may have misconstrued the Act, still it cannot be questioned that, excepting where rights have become vested under a treaty, to use the expression of Judge SWAYNE, in the *Cherokee Tobacco Case,* 11 Wall. 616, "a treaty may supersede a prior Act of Congress and an Act of Congress may supersede a prior treaty." The commissioner of navigation held that the Acts of 1884 and 1886 were inconsistent with the treaties, and being of a later date must prevail, and in so ruling he is not without authority of adjudged cases. In *Foster* v. *Neilson,* 2 Pet. 314, Chief Justice MARSHALL, in delivering the opinion of the court, said:

> Our constitution declares a treaty to be a law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the

> terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial, department and the legislature must execute the contract before it can become a rule for the court.

The same doctrine is held in *Taylor* v. *Morton,* 2 Curt. 454; *Ropes* v. *Clinch,* 8 Blatchf. 304. In the *Cherokee Tobacco Case, supra,* there was an open conflict between a treaty contract and a subsequent law, and the question was as to which should prevail. The 107th section of the Internal Revenue Act of July 20, 1868, provided "that the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same be within a collection district or not." The tenth article of the treaty of 1866 between the United States and the Cherokee Nation of Indians stipulated as follows:

> Every Cherokee Indian and freed person residing in the Cherokee Nation shall have the right to sell any products of his farm, including his or her livestock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying the tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory.

The collection officers had seized a quantity of tobacco belonging to the claimants which was found in the Cherokee Nation, outside of any collection District of the United States, and exemption from duty was claimed by virtue of the treaty. It was admitted that the repugnancy between the treaty and the statute was clear, and that they could not stand together; that one or the other must yield. The court decided that the language of the section was as clear and explicit as could be employed. It embraced indisputably the Indian Territory, and congress not having thought proper to exclude them, it was not for the court to make the exception; and that the consequences arising from the repeal of the treaty were matters for legislative and not judicial action, and if a wrong had been done, the power of redress was with congress and not with the judiciary. In *Taylor* v. *Morton,* the facts were these: Article 6 of the treaty of

1832, with Russia, stipulated that "no higher or other duties shall be imposed upon the importations into the United States of any article the produce or manufacture of Russia, than are or shall be payable on the like article being the produce or manufacture of any other foreign country." This was held by the court to be merely an agreement, to be carried into effect by Congress, and not to be enforced by the court, and that an Act of Congress laying a duty of $25 a ton, on hemp from India, and $40 a ton, on hemp from other countries, did not authorize the courts to decide that Russian hemp should be admitted at the lower rate. Such a promise, it was said, addresses itself to the political and not to the judicial department of the Government, and the courts can not try the question whether it has been observed or not. The court expressly declined to give any opinion on the merits of the case, holding that the questions, whether treaty obligations have been kept or not, and whether treaty promises shall be withdrawn or performed, are matters that belong to diplomacy and legislation, and not to the administration of the laws. If Congress has departed from the treaty, it is immaterial to inquire whether the departure was accidental or designed, and if the latter whether the reasons therefor were good or bad. If, by the act in question, they have not departed from the treaty, the plaintiff has no case. If they have, their act is the municipal law of the country, and any complaint, either by the citizen or the foreigner, must be made to those who alone are empowered by the constitution to judge of its grounds and act as may be suitable and just.

As to the time when the Act of June 19, 1886, went into operation, whether immediately from and after the date of its approval, or not until the date of the President's proclamation, and also whether the voyages of the plaintiff's vessels from Bremen to New York must be made "directly," and without stoppage at an intermediate port, in order to be exempted from the imposition and payment of tonnage dues, the decision of these questions by the commissioner of navigation must be held to be conclusive, unless so much of section 3 of the act of July 5, 1884, which makes his decision final in such matters, is unconstitutional. Much learning and ability have been employed by plaintiff's counsel to establish the invalidity of this portion of the act, which invests a department officer with such unlimited judicial power, and by which he is enabled to decide all contests in relation to alleged illegal dues, *ex parte*, and absolutely. On the other hand, the

labor and responsibility of the court have been increased by the omission of the defendant's counsel to furnish any assistance towards the solution of the questions, and permitting them to pass *sub silentio*. The subject, however, is not *res integra*. In *Cary v. Curtis*, 3 How. 236, the supreme court had under consideration the constitutionality of the third section of the act of congress of March 3, 1839, entitled "An Act making appropriations for the civil and diplomatic expenses of the Government for the year 1839," by which the Secretary of the Treasury was authorized to finally decide when more duties had been paid to any collector of customs, or to any person acting as such, than the law required, and to draw his warrant in favor of the person or persons entitled for a refund of the amounts so overpaid. The opinion of the court discusses very ably and at much length the questions involved in that case. A few sentences taken from the opinion will indicate the grounds upon which the validity of the Act of 1839 was sustained:

> We have no doubt [say the court] of the objects or the import of that act. We can not doubt that it constitutes the Secretary of the Treasury the source whence instructions are to flow; that it controls both the position and the conduct of the collectors of the revenue; that it has denied to them any right or authority to retain any portion of the revenue for purposes of contestation or indemnity; has ordered and declared those collectors to be the mere organs of receipt and transfer, and has made the head of the treasury department the tribunal for the examination of claims for duties said to have been improperly paid. * * * It is contended, however, that the language and the purposes of Congress, if really what we hold them to be declared in the statute of 1839, can not be sustained, because they would be repugnant to the constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. * * * The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, viz., that the Government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Secondly, in the doctrine, so often ruled in this court, that the judicial power of the United States, although it has its origin in the constitution, is (except in enumerated instances, ap-

> plicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority. * * * The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law. * * * The courts of the United States can take cognizance only of subjects assigned to them expressly or by necessary implication; *a fortiori,* they can take no cognizance of matters that by law are either denied to them, or expressly referred *ad aliud examen.*

This exposition of the origin and extent of the jurisdiction of the courts of the United States was reaffirmed in *Sheldon v. Sill,* 8 How. 449, where it was held that courts created by statute can have no jurisdiction but such as the statute confers. The right given by section 2931, Rev. Stat., to sue for overpaid dues is taken away by the Act of July 5, 1884, and the power to determine controversies arising from alleged exactions by collectors is deposited with the commissioner of navigation. Such is the effect of the decisions just cited, and which, as long as they are not overruled by the tribunal which made them, must be obeyed as the law of the land. The authorities referred to by plaintiff's counsel are cases where department officers, in making regulations to be observed by their subordinates, exceeded their statutory power, but in no one instance was it pretended that the officer was clothed with the power to make a final decision in contested matters. It was perhaps unnecessary, in view of *Cary* v. *Curtis,* and *Sheldon* v. *Sill,* that I should have done more than acquiesce in the doctrines there announced, and support the validity of the act of July 5, 1884, without further discussion, but the large amount of money involved in the present actions, and the earnestness and force with which the plaintiff's claims have been pressed, have induced me to make a more extended presentation of them than was at first designed. It must be borne in mind that this court is

not called on to express any opinion on the justice or expediency of placing such unlimited power in the hands of the commissioner of navigation as is conferred by the act of July 5, 1884. The duty of the court is to discover whether the act is in conflict with the constitution, and, on being satisfied that it is not, to judge accordingly. To pursue any other course would be not only extrajudicial, but also improper, in assuming to criticise the wisdom of Congress in making the law. Neither is the court required to say whether the commissioner of navigation is or is not correct in his interpretation of the law. Congress has seen fit to constitute him the final arbiter in certain disputes, and congress alone can supply a remedy for any wrong which may have arisen from his construction of the law relating to the collection of tonnage due. Let judgment be entered in each case for the defendant.

DISCONTO GESELLSCHAFT v. UMBREIT [1]

ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY (BRANCH No. 1)

STATE OF WISCONSIN

No. 63. Argued December 10, 11, 1907. Decided February 24, 1908.

It is too late to raise the Federal question on motion for rehearing in the state court, unless that court entertains the motion and expressly passes on the Federal question.

While aliens are ordinarily permitted to resort to our courts for redress of wrongs and protection of rights, the removal of property to another jurisdiction for adjustment of claims against it is a matter of comity and not of absolute right, and, in the absence of treaty stipulations, it is within the power of a State to determine its policy in regard thereto.

The refusal by a State to exercise comity in such manner as would impair the rights of local creditors by removing a fund to a foreign jurisdiction for administration does not deprive a foreign creditor of his property without due process of law or deny to him the equal protection of the law; and so held as to a judgment of the highest court of Wisconsin holding the attachment of a citizen of that State superior to an earlier attachment of a foreign creditor.

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[1] 208 U. S. 570.

While the treaty of 1828 with Prussia has been recognized as being still in force by both the United States and the German Empire, there is nothing therein undertaking to change the rule of national comity that permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of its jurisdiction for administration in favor of creditors beyond its borders.

127 Wisconsin, 676, affirmed.

The facts are stated in the opinion.

Mr. F. C. Winkler for plaintiff in error:

The Federal questions on both points were brought before the Supreme Court of the State and claim made under them in the argument for rehearing. The motion was denied and opinion rendered expressly overruling the claim based on the treaties and by necessary implication, also the claim based on the Constitution of the United States.

The rulings upon them are therefore subject to review. *McKay* v. *Kalyton*, 204 U. S. 458; *Leigh* v. *Green*, 193 U. S. 79; *Columbia Water Power Co.* v. *Columbia Street Railway Co.*, 172 U. S. 465.

The plaintiff's suit was brought under the statutes of Wisconsin. The defendant was in Wisconsin. The property attached had been brought by him and placed on deposit in the State of Wisconsin. No court in the world could exercise jurisdiction either over his person or over his property except the courts of Wisconsin. No statute debars an alien from seeking justice in Wisconsin courts where the protection of his rights requires it.

The plaintiff is denied the benefit of the proceedings and of its judgment because being a foreigner it has no rights in the State of Wisconsin except such as "comity," which is "good nature," will accord it. Even under the ruling of the state court that the right of the plaintiff to pursue its absconding debtor into this country and to invoke the latter's remedial processes against him rests upon the comity, it is, however, the comity of the sovereignty, not of the court. Wharton, Conflict of Laws, Sec. 1*a*.

Comity can not be given or withheld at will. Civilization demands its exercise where justice requires it. It can not be denied, in whole or in part, except on clear, clean principles of justice.

Under the treaty between the United States and the Kingdom of Prussia, made in 1828, if a proper and liberal interpretation be given thereto, the plaintiff in error is entitled to the same standing in court

as a citizen of the United States would be in a like case. Public Treaties (Govt. Printing Office, 1875), p. 656; *Tucker* v. *Alexandroff,* 183 U. S. 424, 437. The cases cited by the Supreme Court of Wisconsin, viz.: *Eingartner* v. *Illinois Steel Co.,* 94 Wisconsin, 70; *Gardner* v. *Thomas,* 14 Johnson, 134; *Johnson* v. *Dalton,* 1 Cowen, 543; *DelVitt* v. *Buchanan,* 54 Barb. 31; *Olsen* v. *Schierenberg,* 3 Daly, 100; *Burdick* v. *Freeman,* 120 N. Y. 421, can easily be distinguished from the case at bar.

The state court erred in stating that plaintiff sues as the agent of a foreign trustee in bankruptcy. That trustee has and claims no rights to the bankrupt's property in Wisconsin. Foreign law does not operate on property beyond its jurisdiction. *Segnitz* v. *G. C. Banking & Trust Co.,* 117 Wisconsin, 171, 176.

The property in question was not transferred to the trustee and that left its legal title in the debtor. The plaintiff being a creditor brought suit on his own claim in his own right.

The circumstance that the creditor after suit commenced promised to turn over the proceeds he should recover to the trustee for distribution does not impair his rights as a creditor.

The course of the plaintiff in no way "sets at naught" the rule of our law that the trustee in bankruptcy does not obtain title to property in Wisconsin by reason of the proceedings in Germany. No claim is made on this score in the intervenor's answer.

The decision of the Supreme Court of Wisconsin deprives the plaintiff of its property rights without due process of law, in violation of the Constitution of the United States.

The judgment which the intervenor obtained, although in the form of the statute, is in point of fact no better than an *ex parte* affidavit. The defendant was to the intervenor's knowledge a prisoner in Germany. The only notice given was by publication of the summons in a Milwaukee paper. No copy of the summons and complaint was ever mailed to the defendant as required by Sec. 2640, Statutes of Wisconsin.

The defendant Terlinden, when the intervenor's suit was commenced against him, had not the slightest interest in the property sought to be reached. All his interest had passed to the plaintiff. The plaintiff was the only party adversely interested to the intervenor. It had an adjudicated lien good against all the world (except the claim of the intervenor).

An alien, too, is entitled to due process of law under the Constitution of the United States. *In re Ah Fung,* 3 Sawyer, 144; *Ah Kow* v. *Nunan,* 5 Sawyer, 562; *In re Ah Chung,* 2 Fed. Rep. 733.

The judgment against Terlinden was, as against this plaintiff, absolutely without process of law. It adjudicated nothing. The plaintiff was not a party therein, nor was it notified, and it had no opportunity to defend against it.

Mr. Joseph B. Doe for defendant in error:

Domestic creditors will be protected to the extent of not allowing the property or funds of a non-resident debtor to be withdrawn from the State before domestic creditors have been paid. Every country will first protect its own citizens. *Catlin* v. *Silver Plate Co.,* 123 Indiana, 477; *Chafey* v. *Fourth Nat. Bank,* 71 Main, 414, 524; *Bagby* v. *Railway Co.,* 86 Pa. St. 291; *Lycoming Fire Ins. Co.* v. *Wright,* 55 Vermont, 526; *Thruston* v. *Rosenfelt,* 42 Missouri, 474; *Willitts* v. *Waite,* 25 N. Y. 577.

Citizens and residents of the country where insolvency proceedings have been instituted are bound by such proceedings and can not pursue the property of the insolvent debtor in another country. *Cole* v. *Cunningham,* 133 U. S. 107; *Linville* v. *Hadden,* 88 Maryland, 594; *Chafey* v. *Fourth Nat. Bank, supra; Einer* v. *Beste,* 32 Missouri, 240; *Long* v. *Girdwood,* 150 Pa. St. 413; *Bacon* v. *Horne,* 123 Pa. St. 452.

A creditor, by proving his claim in bankruptcy or any insolvency proceedings, submits to the jurisdiction of the court in which the proceeding is pending and can not pursue his remedy elsewhere. *Clay* v. *Smith,* 3 Peters, 411; *Cooke* v. *Coyle,* 113 Massachusetts, 252; *Ormsby* v. *Dearborn,* 116 Massachusetts, 386; *Batchelder* v. *Batchelder,* 77 N. H. 31; *Wilson* v. *Capuro,* 41 California, 545; *Wood* v. *Hazen,* 10 Hun. 362.

Where both parties, plaintiff and defendant, are residents of a foreign State, the plaintiff can not come into our country and obtain an advantage by our law which he could not obtain by his own.

If he seeks to nullify the law of his own State and asks our courts to aid him in so doing, he can not have such assistance, if for no other reason than that it is forbidden by public policy and the comity which exists between states and nations, which comity will always be enforced when it does not conflict with the rights of domestic citizens. *Bacon* v. *Horne, supra; In re Waite,* 99 N. Y. 433; *Bagby* v. *Railway Co., supra.*

Citizens of a foreign State or country will not be aided by the courts of this country to obtain, by garnishment, a preference of their claims against a foreign debtor, in disregard of proceedings in their own country for the sequestration of the debtor's estate and the appointment of a trustee thereof in bankruptcy. *Long* v. *Girdwood, supra.*

It is the uniform rule and doctrine of all courts that the principles of comity do not require that courts confer powers upon a foreign receiver or trustee in bankruptcy or permit him to bring and maintain actions in this State that interfere with and impair the rights of domestic creditors. *Humphreys* v. *Hopkins,* 81 California, 551; *Ward* v. *Pac. Mutual Life Ins. Co.,* 135 California, 235; *Hunt* v. *Columbian Ins. Co.,* 55 Maine, 290; *Pierce* v. *O'Brien,* 129 Massachusetts, 314; *Rogers* v. *Riley,* 80 Fed. Rep. 759; *Catlin* v. *Wilcox Silver Plate Co.,* 123 Indiana, 477.

Mr. Justice Day delivered the opinion of the court.

The Disconto Gesellschaft, a banking corporation of Berlin, Germany, began an action in the Circuit Court of Milwaukee County, Wisconsin, on August 17, 1901, against Gerhard Terlinden and at the same time garnisheed the First National Bank of Milwaukee. The bank appeared and admitted an indebtedness to Terlinden of $6,420. The defendant in error Umbreit intervened and filed an answer, and later an amended answer.

A reply was filed, taking issue upon certain allegations of the answer, and a trial was had in the Circuit Court of Milwaukee County, in which the court found the following facts:

> That on the 17th day of August, 1901, the above-named plaintiff, the Disconto Gesellschaft, commenced an action in this court against the above-named defendant, Gerhard Terlinden, for the recovery of damages sustained by the tort of the said defendant, committed in the month of May, 1901; that said defendant appeared in said action by A. C. Umbreit, his attorney, on August 19, 1901, and answered the plaintiff's complaint; that thereafter such proceedings were had in said action that judgment was duly given on February 19, 1904, in favor of said plaintiff, Disconto Gesellschaft, and against said defendant, Terlinden, for $94,145.11 damages and costs; that $85,371.49, with interest from March 26, 1904, is now due and unpaid thereon; that at the time of the commencement of said action, to wit, on August 17, 1901, process in garnishment was served on the above-named garnishee,

First National Bank of Milwaukee, as garnishee of the defendant Terlinden.

That on August 9, 1901, and on August 14, 1901, a person giving his name as Theodore Grafe deposited in said First National Bank of Milwaukee the equivalent of German money aggregating $6,420.00 to his credit upon account; that said sum has remained in said bank ever since, and at the date hereof with interest accrued thereon amounted to $6,969.47.

That the defendant Gerhard Terlinden and said Theodore Grafe, mentioned in the finding, are identical and the same person.

That the interpleaded defendant, Augustus C. Umbreit, on March 21, 1904, commenced an action in this court against the defendant Terlinden for recovery for services rendered between August 16, 1901, and February 1, 1903; that no personal service of the summons therein was had on the said summons therein was served by publication only and without the mailing of a copy of the summons and of complaint to said defendant; that said defendant did not appear therein; that on June 11, 1904, judgment was given in said action by default in favor of said Augustus C. Umbreit and against said defendant Terlinden for $7,500 damages, no part whereof has been paid; that at the time of the commencement of said action process of garnishment was served, to wit, on March 22, 1904, on the garnishee, First National Bank of Milwaukee, as garnishee of said defendant Terlinden.

That the defendant Terlinden at all the times set forth in finding number one was and still is a resident of Germany; that about July 11, 1901, he absconded from Germany and came to the State of Wisconsin and assumed the name of Theodore Grafe; that on August 16, 1901, he was apprehended as a fugitive from justice upon extradition proceedings duly instituted against him, and was thereupon extradited to Germany.

That the above-named plaintiff, the Disconto Gesellschaft, at all the times set forth in the findings was, ever since has been and still is a foreign corporation, to wit, of Germany, and during all said time had its principal place of business in Berlin, Germany; that the above-named defendant, Augustus C. Umbreit, during all said times was and still is a resident of the State of Wisconsin.

That on or about the 27th day of July, 1901, proceedings in bankruptcy were instituted in Germany against said defendant Terlinden, and Paul Hecking appointed trustee of his estate in such proceedings on said date; that thereafter, and on or after August 21, 1901, the above-named plaintiff, the Disconto Gesellschaft, was appointed a member of the committee of creditors of the defendant Terlinden's personal estate, and accepted such ap-

pointment; and that the above-named plaintiff, the Disconto Gesellschaft, presented its claim to said trustee in said bankruptcy proceedings; that said claim had not been allowed by said trustee in January, 1902, and there is no evidence that it has since been allowed; that nothing has been paid upon said claim; that said claim so presented and submitted is the same claim upon which action was brought by the plaintiff in this court and judgment given, as set forth in finding No. 1; that said action was instituted by said plaintiff, the Disconto Gesellschaft, through the German consul in Chicago; and that the steps so taken by the plaintiff, the Disconto Gesellschaft, had the consent and approval of Dr. Paul Hecking as trustee in Bankruptcy, so appointed in the bankruptcy proceedings in Germany, and that after the commencement of the same the plaintiff, the Disconto Gesellschaft, agreed with said trustee that the moneys it should recover in said action should form part of the said estate in bankruptcy and be handed over to said trustee; that, among other provisions, the German bankrupt act contained the following: "Sec. 14. Pending the bankruptcy proceedings, neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors."

Upon the facts thus found the Circuit Court rendered a judgment giving priority to the levy of the Disconto Gesellschaft for the satisfaction of its judgment out of the fund attached in the hands of the bank. Umbreit then appealed to the Supreme Court of Wisconsin. That court reversed the judgment of the Circuit Court, and directed judgment in favor of Umbreit, that he recover the sum garnisheed in the bank. 127 Wisconsin, 651. Thereafter a remittitur was filed in the Circuit Court of Milwaukee County and a final judgment rendered in pursuance of the direction of the Supreme Court of Wisconsin. This writ of error is prosecuted to reverse that judgment. At the same time a decree in an equity suit, involving a fund in another bank, was reversed and remanded to the Circuit Court. This case had been heard, by consent, with the attachment suit. With it we are not concerned in this proceeding.

No allegation of Federal rights appeared in the case until the application for rehearing. In this application it was alleged that the effect of the proceedings in the state court was to deprive the plaintiff in error of its property without due process of law, contrary to the Fourteenth Amendment, and to deprive it of certain rights and privileges guaranteed to it by treaty between the Kingdom of Prussia and

the United States. The Supreme Court of Wisconsin, in passing upon the petition for rehearing and denying the same, dealt only with the alleged invasion of treaty rights, overruling the contention of the plaintiff in error. 127 Wisconsin, 676. It is well settled in this court that it is too late to raise Federal questions reviewable here by motions for rehearing in the state court. *Pim* v. *St. Louis,* 165 U. S. 273; *Fullerton* v. *Texas,* 196 U. S. 192; *McMillen* v. *Ferrum Mining Company,* 197 U. S. 343, 347; *French* v. *Taylor,* 199 U. S. 274, 278. An exception to this rule is found in cases where the Supreme Court of the State entertains the motion and expressly passes upon the Federal question. *Mallett* v. *North Carolina,* 181 U. S. 589; *Leigh* v. *Green,* 193 U. S. 79.

Conceding that this record sufficiently shows that the Supreme Court heard and passed upon the Federal questions made upon the motion for rehearing, we will proceed briefly to consider them.

The suit brought by the Disconto Gesellschaft in attachment had for its object to subject the fund in the bank in Milwaukee to the payment of its claim against Terlinden. The plaintiff was a German corporation and Terlinden was a German subject. Umbreit, the intervenor, was a citizen and resident of Wisconsin. The Supreme Court of Wisconsin adjudged that the fund attached could not be subjected to the payment of the indebtedness due the foreign corporation as against the claim asserted to the fund by one of its own citizens, although that claim arose after the attachment by the foreign creditor; and, further, that the fact that the effect of judgment in favor of the foreign corporation would be, under the facts found, to remove the fund to a foreign country, there to be administered in favor of foreign creditors, was against the public policy of Wisconsin, which forbade such discrimination as against a citizen of that State.

Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights. 4 Moore, International Law Digest, § 536, p. 7; Wharton on Conflict of Laws, § 17.

But what property may be removed from a State and subjected to the claims of creditors of other States, is a matter of comity between nations and states and not a matter of absolute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction.

" 'Comity,' in the legal sense," says Mr. Justice Gray, speaking for this court in *Hilton* v. *Guyat*, 159 U. S. 113, 163, "is neither a matter of absolute obligation on the one hand nor of mere courtesy and good-will upon the other. But it is the recognition which one nation allows in its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

In the elaborate examination of the subject in that case many cases are cited and the writings of leading authors on the subject extensively quoted as to the nature, obligation and extent of comity between nations and states. The result of the discussion shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case, and that all civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgment in such wise as to prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction. Such recognition is not inconsistent with that moral duty to respect the rights of foreign citizens which inheres in the law of nations. Speaking of the doctrine of comity, Mr. Justice Story says: "Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasion on which its exercises may be justly demanded." Story on Conflict of Laws, § 33.

The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other States as against the demands of local creditors, by attachment or otherwise in the State where the property is situated. The cases were reviewed by Mr. Justice Brown, delivering the opinion of the court in *Security Trust Company* v. *Dodd, Mead & Co.*, 173 U. S. 624, and the conclusion reached that voluntary assignments for the benefit of creditors should be given force in other States as to property therein situate, except so far as they come in conflict with the rights of local creditors, or with the public policy of the State in which it is sought to be enforced; and, as was said by Mr. Justice McLean in *Oakey v. Bennett*, 11 How. 33, 44, "national comity does not require any government to give effect to such assignment [for the benefit of creditors] when it shall impair the remedies or lesson the securities of its own citizens."

There being, then, no provision of positive law requiring the recognition of the right of the plaintiff in error to appropriate property in the State of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the State permitted such recognition was a matter for the State to determine for itself. In determining that the policy of Wisconsin would not permit the property to be thus appropriated to the benefit of alien creditors as against the demands of the citizens of the State, the Supreme Court of Wisconsin has done no more than has been frequently done by nations and states in refusing to exercise the doctrine of comity in such wise as to impair the right of local creditors to subject local property to their just claims. We fail to perceive how this application of a well known rule can be said to deprive the plaintiff in error of its property without due process of law.

Upon the motion for rehearing the plaintiff in error called attention to two alleged treaty provisions between the United States and the kingdom of Prussia, the first from the treaty of 1828, and the second from the treaty of 1799. As to the last mentioned treaty the following provision was referred to:

> Each party shall endeavor by all the means in their power to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land.

The treaty of 1799 expired by its own terms on June 2, 1810, and the provision relied upon is not set forth in so much of the treaty as was revived by article 12 of the treaty of May 1, 1828. See Compilation of Treaties in Force, 1904, prepared under resolution of the Senate, pp. 638 *et seq.* If this provision of the treaty of 1799 were in force we are unable to see that it has any bearing upon the present case.

Article one of the treaty of 1828 between the kingdom of Prussia and the United States is as follows:

> There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party

> wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing.

This treaty is printed as one of the treaties in force in the compilation of 1904, p. 643, and has undoubtedly been recognized by the two governments as still in force since the formation of the German Empire. See *Terlinden* v. *Ames*, 184 U. S. 270; Foreign Relations of 1883, p. 369; Foreign Relations of 1885, pp. 404, 443, 444; Foreign Relations of 1887, p. 370; Foreign Relations of 1895, part one, 539.

Assuming, then, that this treaty is still in force between the United States and the German Empire, and conceding the rule that treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured, is there anything in this article which required any different decision in the Supreme Court of Wisconsin than that given? The inhabitants of the respective countries are to be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as the natives of the country wherein they reside, upon submission to the laws and ordinances there prevailing. It requires very great ingenuity to perceive anything in this treaty provision applicable to the present case. It is said to be found in the right of citizens of Prussia to attend to their affairs in this country. The treaty provides that for that purpose they are to have the same security and protection as natives in the country wherein they reside. Even between States of the American Union, as shown in the opinion of Mr. Justice Brown in *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. *supra*, it has been the constant practice not to recognize assignments for the benefit of creditors outside the State, where the same came in conflict with the rights of domestic creditors seeking to recover their debts against local property. This is the doctrine in force as against natives of the country residing in other states, and it is this doctrine which has been applied by the Supreme Court of Wisconsin to foreign creditors residing in Germany. In short, there is nothing in this treaty undertaking to change the well-recognized rule between states and nations

which permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond their borders.

The judgment of the Circuit Court of Milwaukee County entered upon the remittitur from the Supreme Court of Wisconsin is

Affirmed.

CASE OF THE APPAM[1]

Supreme Court of the United States

Nos. 650 and 722.—October Term, 1916

Hans Berg, Prize Master in Charge of the Prize Ship *Appam,* and L. M. von Schilling, Vice-Consul of the German Empire, Appellants,
650 *vs.*
British & African Steam Navigation Co.
Same,
722 *vs.*
Henry G. Harrison, Master of the Steamship *Appam.*

Appeals from the District Court of the United States for the Eastern District of Virginia.

[March 6, 1917.]

Mr. Justice Day delivered the opinion of the Court.

These are appeals from the District Court of the United States for the Eastern District of Virginia, in two admiralty cases. No. 650 was brought by the British & African Steam Navigation Company, Limited, owner of the British steamship, *Appam,* to recover possession of that vessel. No. 722 was a suit by the master of the *Appam* to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute and from them it appears: That during the existence of the present war between Great Britain and Germany, on the 15th day of January, 1916, the steamship *Appam* was captured

[1]Print of the Reporter of the Supreme Court of the United States.

on the high seas by the German cruiser *Moewe*. The *Appam* was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7,800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom mere military prisoners of the English Government. She had a crew of 160 or thereabouts, and carried a three-pound gun at the stern. The *Appam* was brought to by a shot across her bows from the *Moewe*, when about a hundred yards away, and was boarded without resistance by an armed crew from the *Moewe*. This crew brought with them two bombs, one of which was slung over the bow and the other over the stern of the *Appam*. An officer from the *Moewe* said to the captain of the *Appam* that he was sorry he had to take his ship, asked him how many passengers he had, what cargo, whether he had any specie, and how much coal. When the shot was fired across the bows of the *Appam*, the captain instructed the wireless operator not to touch the wireless instrument, and his officers not to let any one touch the gun on board. The officers and crew of the *Appam*, with the exception of the engine-room force, thirty-five in number, and the second officer, were ordered on board the *Moewe*. The captain, officers and crew of the *Appam* were sent below, where they were held until the evening of the 17th of January, when they and about 150 others, officers and crews of certain vessels previously sunk by the *Moewe*, were ordered back to the *Appam* and kept there as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the *Appam* he was now a member of the German navy; if he did not obey orders his brains would be blown out, but if he obeyed, not a hair of his head should be touched. The *Appam's* officer was instructed to tell his staff the same thing, and if they did not obey orders they would be brought to the German officer and shot. Inquiries were made by the German officer in command of the *Appam* as to revolutions of the engines, the quantity of coal on hand and the coal consumption for different speeds, and instructions were given that steam be kept up handy, and afterwards the engineer was directed to set the engines at the revolutions required, and the ship got under way.

Lieutenant Berg, who was the German officer in command of the *Appam* after its capture, told the engineer on the second morning that he was then in charge of the ship, asked of him information as to fuel consumption, and said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who were relieved from time to time, but did not interfere with the working of the ship. The German officer, Lieutenant Berg, gave directions as to working the engines, and was the only officer on board who wore a uniform.

On the night of the capture, the specie in the specie-room was taken on board the *Moewe*. After Lieutenant Berg took charge of the *Appam,* bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pounds of explosive, was placed on the bridge, and several smaller ones in the chart room. Lieutenant Berg informed the captain of the *Appam,* pointing to one of the bombs, "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said, "There are other bombs about the ship; I do not want to use them, but I shall be compelled to if there is any trouble." The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed. Lieutenant Berg, on reaching Hampton Roads, asked the crew of the *Appam* to drop the anchor, as he had not men to do it.

During the trip to the westward, the officers and crew of the *Appam* were not allowed to see the ship's compass to ascertain her course, and all lights were obscured during the voyage. The German prisoners, with the exception of two who went on board the *Moewe,* were armed and placed over the passengers and crew of the *Appam* as a guard all the way across. For two days after the capture, the *Appam* remained in the vicinity of the *Moewe,* and then was started westward. Her course for the first two or three days was southwesterly, and afterwards westerly, and was continued until her arrival at the Virginia Capes on the 31st of January. The engine-room staff of the *Appam* was on duty operating the vessel across to the United States;

the deck crew of the *Appam* kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German prisoners.

At the time of the capture, the *Appam* was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely, Punchello, in the Madeiras, 130 miles; from Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The *Appam* was found to be in first class order, seaworthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the *Moewe* is as follows:

> Information for the American Authorities. The bearer of this, Lieutenant of the Naval Reserve, Berg, is appointed by me to the command of the captured English steamer *Appam* and has orders to bring the ship into the nearest American harbor and there to lay up. Kommando S. M. H. *Moewe*. Count Zu Dohna, Cruiser Captain and Commander. (Imperial Navy Stamp.) Kommando S. M. S. *Moewe*.

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the Collector, and filed a copy of his instructions to bring the *Appam* into the nearest American port and there to lay up.

On February 2nd, His Excellency, The German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the *Appam* be detained in the United States for the remainder of the war.

The prisoners brought in by the *Appam* were released by order of the American Government.

On February 16th, and sixteen days after the arrival of the *Appam* in Hampton Roads, the owner of the *Appam* filed the libel in case No. 650, to which answer was filed on March 3rd. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the *Appam* upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the respondents to the amended libel alleged that the *Appam* was brought in as a prize by a prize master,

in reliance upon the Treaty of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war; and averred that the American court had no jurisdiction.

The libel against the *Appam's* cargo was filed on March 13th, 1916, and answer filed on March 31st. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the court appointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over $600,000, are now in the registry of the court, and the unsold portions of the cargo are now in the custody of the marshal of the Eastern District of Virginia.

The argument in this case has taken wide range, and orally and in printed briefs counsel have discussed many questions which we do not consider necessary to decide in determining the rights involved in these appeals.

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this Nation's neutrality under the principles of international law. Second, was such use of an American port justified by the existing treaties between the German Government and our own. Third, was there jurisdiction and right to condemn the *Appam* and her cargo in a court of admiralty of the United States.

It is familiar international law that the usual course after the capture of the *Appam* would have been to take her into a German port, where a prize court of that Nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, *i. e.,* for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the *Appam* was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up and in a note from His Excellency, The German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice. (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State, European War No. 3, page 331,) and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German Government concerning the *Appam* (*Id.* page 333), in which it was stated:

> *Appam* is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to Article 19 of the Prusso-American treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to Article 28. The above-mentioned Article 19 authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English.

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the *Appam* was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to

maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to seaworthiness, provisions and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th American Edition, Section 391, and accords with our own practice. Moore's Digest of International Law, Vol. 7, 936, 937, 938.

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality, which among other things inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of nations. Moore on International Arbitrations, v. 4, 3967 *et seq.*

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

> A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.
>
> It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Article 22 provides:

> A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations.

They were not ratified by the British Government. This Government refused to adhere to Article 23, which provides:

> A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a Prize court. It may have the prize taken to another of its ports.
>
> If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.
>
> If the prize is not under convoy, the prize crew are left at liberty.

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it,

> "subject to the reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 thereof implies the duty of a neutral Power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat., Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestrated pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept Article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899–1907, Vol. II, p. 237 *et seq.*

Much stress is laid upon the failure of this Government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that having failed to interdict the entrance of prizes into

our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that Article XIX of the Treaty of 1799 justifies bringing in and keeping the *Appam* in an American port, in the situation which we have outlined, it appears that in response to a note from His Excellency, The German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, *supra*, page 335 *et seq.*); and we think this view is justified by a consideration of the terms of the treaty. Article XIX of the Treaty of 1799, using the translation adopted by the American State Department, reads as follows:

> The vessels of war, public and private, of both parties, shall carry (*conduire*) freely, wheresoever they please, the vessels and effects taken (*pris*) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (*prises*) be arrested, searched or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (*conduites*) out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions, which the commanding officer of such vessel (*le dit vaisseau*) shall be obliged to show. [But conformably to the treaties existing between the United States and Great Britain, no vessel (*vaisseau*) that shall have made a prize (*prise*) upon British subjects shall have a right to shelter in the ports of the United States, but if (*il est*) forced therein by tempests, or any other danger or accident of the sea, they (*il sera*) shall be obliged to depart as soon as possible.] (The provision concerning the treaties between the United States and Great Britain is no longer in force, having been omitted by the Treaty of 1828. See Compilation of Treaties in Force, 1904, pages 641 and 646.)

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process, when they come into the ports of the high contracting parties, to the end that they may

be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the *Appam* came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another as contemplated in the treaty, and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and can not be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government. We can not avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this Government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass* v. *The Sloop Betsy,* 3 Dallas. 6, decided in 1794, wherein it appeared that the commander of the French privateer, *The Citizen Genet,* captured as a prize on the high seas the sloop *Betsy* and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, reported in 7 Wheaton, 283. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said:

> If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own Courts or the Courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our Courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy. (Page 349.)
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> . . . Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws. (Page 354.)

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheaton, 238, 258; *The Estrella*, 4

Wheaton, 298, 308, 9, 10, 11; *La Amistad de Rues,* 5 Wheaton, 385, 390.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad, supra,* p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principes of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.

Extracts from a Proclamation by the President of the United States, August 22, 1870[1]

Whereas a state of war unhappily exists between France on the one side and the North German Confederation and its allies on the other side; and

Whereas the United States are on terms of friendship and amity with all the contending powers and with the persons inhabiting their several dominions; and

Whereas great numbers of the citizens of the United States reside within the territories or dominions of each of the said belligerents and carry on commerce, trade, or other business or pursuits therein, protected by the faith of treaties: and

Whereas great numbers of the subjects or citizens of each of the said belligerents reside within the territory or jurisdiction of the United States and carry on commerce, trade, or other business or pursuits therein; and

Whereas the laws of the United States, without interfering with the free expression of opinion and sympathy, or with the open manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest:

Now, therefore, I, Ulysses S. Grant, President of the United States, in order to preserve the neutrality of the United States and of their citizens and of persons within their territory and jurisdiction, and to enforce their laws, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf and of the law of nations, may thus be prevented from an unintentional violation of the same, do hereby declare and proclaim that by the act passed on the 20th day of April, A. D. 1818, commonly known as the "neutrality law," the following Acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to wit:

And I do further declare and proclaim that by the nineteenth article of the treaty of amity and commerce which was concluded between

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[1]VII Richardson: Messages and Papers of the Presidents, 86.

His Majesty the King of Prussia and the United States of America on the 11th day of July, A. D. 1799, which article was revived by the treaty of May 1, A. D. 1828, between the same parties, and is still in force, it was agreed that "the vessels of war, public and private, of both parties shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show."

And I do further declare and proclaim that it has been officially communicated to the Government of the United States by the envoy extraordinary and minister plenipotentiary of the North German Confederation at Washington that private property on the high seas will be exempted from seizure by the ships of His Majesty the King of Prussia, without regard to reciprocity.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 22d day of August, A. D. 1870, and of the Independence of the United States of America the ninety-fifth.

[Seal.] U. S. GRANT.

By the President:
HAMILTON FISH.
Secretary of State.

Case of the William P. Frye[1]

The Secretary of State to Ambassador Gerard

[Telegram]

No 1446.]

DEPARTMENT OF STATE,

Washington, March 31, 1915.

You are instructed to present the following note to the German Foreign Office:

Under instructions from my Government I have the honor to present a claim for $228,059.54, with interest from January 28, 1915, against the German Government on behalf of the owners and captain of the American sailing vessel *William P. Frye* for damages suffered by them on account of the destruction of that vessel on the high seas by the German armed cruiser *Prinz Eitel Friedrich*, on January 28, 1915.

The facts upon which this claim arises and by reason of which the German Government is held responsible by the Government of the United States for the attendant loss and damages are briefly as follows:

The *William P. Frye*, a steel sailing vessel of 3,374 tons gross tonnage, owned by American citizens and sailing under the United States flag and register, cleared from Seattle, Wash., November 4, 1914, under charter to M. H. Houser, of Portland, Oreg., bound for Queenstown, Falmouth, or Plymouth for orders, with a cargo consisting solely of 186,950 bushels of wheat owned by the aforesaid Houser and consigned "unto order or to its assigns," all of which appears from the ship's papers which were taken from the vessel at the time of her destruction by the commander of the German cruiser.

On January 27, 1915, the *Prinz Eitel Friedrich* encountered the *Frye* on the high seas, compelled her to stop, and sent on board an armed boarding party, who took possession. After an examination of the ship's papers the commander of the cruiser directed that the cargo be thrown overboard, but subsequently decided to destroy the vessel, and on the following morning, by his order, the *Frye* was sunk.

The claim of the owners and captain consists of the following items:

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[1]Official Print of the Department of State.

Value of ship, equipment, and outfit	$150,000.00
Actual freight as per freight list, 5034 1000/2240 tons at 32-6—£8180-19-6 at $4.86	39,759.54
Traveling and other expenses of Capt. Kiehne and Arthur Sewall & Co., agents of ship, in connection with making affidavits, preparing and filing claim	500.00
Personal effects of Capt. H. H. Kiehne	300.00
Damages covering loss due to deprivation of use of ship	37,500.00
Total	$228,059.54

By direction of my Government, I have the honor to request that full reparation be made by the German Government for the destruction of the *William P. Frye* by the German cruiser *Prinz Eitel Friedrich*.

BRYAN.

Ambassador Gerard to the Secretary of State

No. 1984.]

AMERICAN EMBASSY,
Berlin, April 5, 1915.

The following is translation of the reply of the Foreign Office to my note of April 3:

GERMAN FOREIGN OFFICE,
Berlin, April 5, 1915.

The undersigned has the honor to make reply to the note of His Excellency, Mr. James W. Gerard, Ambassador, the United States of America, dated the 3d instant, foreign office No. 2892, relative to claims for damages for the sinking of the American merchant vessel *William P. Frye* by the German auxiliary cruiser *Prinz Eitel Friedrich*.

According to the reports which have reached the German Government the commander of the *Prinz Eitel Friedrich* stopped the *William P. Frye* on the high seas January 27, 1915, and searched her. He found on board a cargo of wheat consigned to Queenstown, Falmouth, or Plymouth to order. After he had first tried to remove the cargo from the *William P. Frye* he took the ship's papers and her crew on board and sank ship.

It results from these facts that the German commander acted quite in accordance with the principles of international law as laid down in the Declaration of London and the German prize ordinance. The ports of Queenstown, Falmouth, and Plymouth, whither the ship visited was bound, are strongly fortified English coast places, which, moreover, serve as bases for the British naval forces. The cargo of wheat being food or foodstuffs, was conditional contraband within the

meaning of article 24, No. 1, of the Declaration of London, and article 23, No. 1, of the German prize ordinance, and was therefore to be considered as destined for the armed forces of the enemy, pursuant to articles 33 and 34 of the Declaration of London and articles 32 and 33 of the German prize ordinance, and to be treated as contraband pending proof of the contrary. This proof was certainly not capable of being adduced at the time of the visiting of the vessel, since the cargo papers read to order. This, however, furnished the conditions under which, pursuant to article 49 of the Declaration of London and article 113 of the German prize ordinance the sinking of the ship was permissible, since it was not possible for the auxiliary cruiser to take the prize into a German port without involving danger to its own security or the success of its operations. The duties devolving upon the cruiser before destruction of the ship, pursuant to article 50 of the Declaration of London and article 116 of the German prize ordinance, were fulfilled by the cruiser in that it took on board all the persons found on the sailing vessel, as well as the ship's papers.

The legality of the measures taken by the German commander is furthermore subject to examination by the German prize court pursuant to article 51 of the Declaration of London and section 1, No. 2, of the German Code of Prize Procedure. These prize proceedings will be instituted before the prize court at Hamburg as soon as the ship's papers are received and will comprise the settlement of questions whether the destruction of the cargo and the ship was necessary within the meaning of article 49 of the Declaration of London; whether the property sunk was liable to capture; and whether, or to what extent, indemnity is to be awarded the owners. In the trial the owners of ship and cargo would be at liberty, pursuant to article 34, paragraph 3, of the Declaration of London, to adduce proof that the cargo of wheat had an innocent destination and did not, therefore, have the character of contraband. If such proof is not adduced, the German Government would not be liable for any compensation whatever, according to the general principles of international law.

However, the legal situation is somewhat different in the light of the special stipulations applicable to the relations between Germany and the United States since article 13 of the Prussian-American treaty of friendship and commerce of July 11, 1799, taken in connection with article 12 of Prussian-American treaty of commerce and navigation of May 1, 1828, provides that contraband belonging to the subjects or citizens of either party can not be confiscated by the other in any case but only detained or used in consideration of payment of the full value of the same. On the ground of this treaty stipulation which is as a matter of course binding on the German prize court the American owners of ship and cargo would receive compensation even if the court should declare the cargo of wheat to be contraband. Nevertheless the approaching prize proceedings are not rendered superfluous since the competent prize court must examine into the legality of the

capture and destruction and also pronounce upon the standing of the claimants and the amount of indemnity.

The undersigned begs to suggest that the ambassador bring the above to the knowledge of his Government and avails himself, etc.

(Signed) JAGOW.

April 4, 1915.

GERARD.

The Secretary of State to Ambassador Gerard

No. 1583.]

DEPARTMENT OF STATE,
Washington, April 28, 1915.

You are instructed to present the following note to the German Foreign Office:

In reply to Your Excellency's note of the 5th instant, which the Government of the United States understands admits the liability of the Imperial German Government for the damages resulting from the sinking of the American sailing vessel *William P. Frye* by the German auxiliary cruiser *Prinz Eitel Friedrich* on January 28 last, I have the honor to say, by direction of my Government, that while the promptness with which the Imperial German Government has admitted its liability is highly appreciated, my Government feels that it would be inappropriate in the circumstances of this case, and would involve unnecessary delay to adopt the suggestion in your note that the legality of the capture and destruction, the standing of the claimants, and the amount of indemnity should be submitted to a prize court.

Unquestionably the destruction of this vessel was a violation of the obligations imposed upon the Imperial German Government under existing treaty stipulations between the United States and Prussia, and the United States Government, by virtue of its treaty rights, has presented to the Imperial German Government a claim for indemnity on account of the resulting damages suffered by American citizens. The liability of the Imperial German Government and the standing of the claimants as American citizens and the amount of indemnity are all questions which lend themselves to diplomatic negotiation between the two Governments, and happily the question of liability has already been settled in that way. The status of the claimants and the amount of the indemnity are the only questions remaining to be settled, and it is appropriate that they should be dealt with in the same way.

The Government of the United States fully understands that, as stated in your excellency's note, the German Government is liable under the treaty provisions above mentioned for the damages arising from the destruction of the cargo as well as from the destruction of the vessel. But it will be observed that the claim under discussion

does not include damages for the destruction of the cargo, and the question of the value of the cargo therefore is not involved in the present discussion.

The Government of the United States recognizes that the German Government will wish to be satisfied as to the American ownership of the vessel, and the amount of the damages sustained in consequence of her destruction.

These matters are readily ascertainable and if the German Government desires any further evidence in substantiation of the claim on these points in addition to that furnished by the ship's papers, which are already in the possession of the German Government, any additional evidence found necessary will be produced. In that case, however, inasmuch as any evidence which the German Government may wish to have produced is more accessible and can more conveniently be examined in the United States than elsewhere, on account of the presence there of the owners and captain of the *William P. Frye* and their documentary records, and other possible witnesses, the Government of the United States ventures to suggest the advisability of transferring the negotiations for the settlement of these points to the Imperial German embassy at Washington.

In view of the admission of liability by reason of specific treaty stipulations, it has become unnecessary to enter into a discussion of the meaning and effect of the Declaration of London, which is given some prominence in Your Excellency's note of April 5, further than to say that, as the German Government has already been advised, the Government of the United States does not regard the Declaration of London as in force.

BRYAN.

Ambassador Gerard to the Secretary of State

[Telegram]

No. 2391.]

AMERICAN EMBASSY,
Berlin, June 7, 1915.

The following is the text of the reply of the German Government in the *Frye* case:

The undersigned has the honor to make the following reply to the note of His Excellency Mr. James W. Gerard, Ambassador of the United States of America, dated April 30, 1915 (F. O. No. 3291), on the subject of the sinking of the American sailing vessel *William P. Frye* by the German auxiliary cruiser *Prinz Eitel Friedrich:*

The German Government can not admit that, as the American Government assumes, the destruction of the sailing vessel mentioned

constitutes a violation of the treaties concluded between Prussia and the United States at an earlier date and now applicable to the relations between the German Empire and the United States or of the American rights derived therefrom. For these treaties did not have the intention of depriving one of the contracting parties engaged in war of the right of stopping the supply of contraband to his enemy when he recognizes the supply of such articles as detrimental to his military interests. On the contrary, Article 13 of the Prussian-American Treaty of July 11, 1799, expressly reserves to the party at war the right to stop the carrying of contraband and to detain the contraband; it follows then that if it can not be accomplished in any other way, the stopping of the supply may in the extreme case be effected by the destruction of the contraband and of the ship carrying it. As a matter of course, the obligation of the party at war to pay compensation to the interested persons of the neutral contracting party remains in force whatever be the manner of stopping the supply.

According to general principles of international law, any exercise of the right of control over the trade in contraband is subject to the decision of the Prize Courts, even though such right may be restricted by special treaties. At the beginning of the present war Germany, pursuant to these principles, established by law prize jurisdiction for cases of the kind under consideration. The case of the *William P. Frye* is likewise subject to the German prize jurisdiction, for the Prussian-American Treaties mentioned contain no stipulation as to how the amount of the compensation provided by Article 13 of the treaty cited is to be fixed. The German Government, therefore, complies with its treaty obligations to a full extent when the Prize Courts instituted by it in accordance with international law proceed in pursuance of the treaty stipulations and thus award the American interested persons equitable indemnity. There would, therefore, be no foundation for a claim of the American Government, unless the Prize Courts should not grant indemnity in accordance with the treaty; in such an event, however, the German Government would not hesitate to arrange for equitable indemnity notwithstanding. For the rest, prize proceedings in the case of the *Frye* are indispensable, apart from the American claims, for the reason that other claims of neutral and enemy interested parties are to be considered in the matter.

As was stated in the note of April 4 last, the Prize Court will have to decide the questions whether the destruction of the ship and cargo was legal; whether and under what conditions the property sunk was liable to confiscation, and to whom and in what amount indemnity is to be paid provided application therefor is received. Since the decision of the Prize Court must first be awaited before any further position is taken by the German Government, the simplest way for the American interested parties to settle their claims would be to enter them in the competent quarter in accordance with the provisions of the German Code of Prize Procedure.

The undersigned begs to suggest that the ambassador bring the above to the knowledge of his Government, and avails himself at the same time of the opportunity to renew the assurances of his most distinguished consideration.

(Signed.) v. JAGOW.

GERARD.

The Secretary of State to Ambassador Gerard

[Telegram]

No. 1868.]

DEPARTMENT OF STATE,
Washington, June 24, 1915.

You are instructed to present the following note to the German Minister of Foreign Affairs:

I have the honor to inform Your Excellency that I duly communicated to my Government your note of the 7th instant on the subject of the claim presented in my note of April 3d last, on behalf of the owners and captain of the American sailing vessel *William P. Frye* in consequence of her destruction by the German auxiliary cruiser *Prinz Eitel Friedrich.*

In reply I am instructed by my Government to say that it has carefully considered the reasons given by the Imperial German Government for urging that this claim should be passed upon by the German Prize Court instead of being settled by direct diplomatic discussion between the two Governments, as proposed by the Government of the United States, and that it regrets to find that it can not concur in the conclusions reached by the Imperial German Government.

As pointed out in my last note to you on this subject, dated April 30, the Government of the United States has considered that the only question under discussion was the method which should be adopted for ascertaining the amount of the indemnity to be paid under an admitted liability, and it notes with surprise that in addition to this question the Imperial German Government now desires to raise some questions as to the meaning and effect of the treaty stipulations under which it has admitted its liability.

If the Government of the United States correctly understands the position of the Imperial German Government as now presented, it is that the provisions of Article 13 of the Treaty of 1799 between the United States and Prussia, which is continued in force by the Treaty of 1828, justified the commander of the *Prinz Eitel Friedrich* in sinking the *William P. Frye,* although making the Imperial German Government liable for the damages suffered in consequence, and that inasmuch as the treaty provides no specific method for ascertaining the

amount of indemnity to be paid, that question must be submitted to the German Prize Court for determination.

The Government of the United States, on the other hand, does not find in the treaty stipulations mentioned any justification for the sinking of the *Frye*, and does not consider that the German Prize Court has any jurisdiction over the question of the amount of indemnity to be paid by the Imperial German Government on account of its admitted liability for the destruction of an American vessel on the high seas.

You state in your note of the 7th instant that Article 13 of the above-mentioned treaty of 1799 "expressly reserves to the party at war the right to stop the carrying of contraband and to detain the contraband; it follows then that if it can not be accomplished in any other way, the stopping of the supply may in the extreme case be effected by the destruction of the contraband and of the ship carrying it."

The Government of the United States can not concur in this conclusion. On the contrary, it holds that these treaty provisions do not authorize the destruction of a neutral vessel in any circumstances. By its express terms the treaty prohibits even the detention of a neutral vessel carrying contraband if the master of the vessel is willing to surrender the contraband. Article 13 provides "in the case supposed of a vessel stopped for articles of contrabands if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage."

In this case the admitted facts show that pursuant to orders from the commander of the German cruiser, the master of the *Frye* undertook to throw overboard the cargo of that vessel, but that before the work of delivering out the cargo was finished the vessel with the cargo was sunk by order of the German commander.

For these reasons, even if it be assumed as Your Excellency has done, that the cargo was contraband, your contention that the destruction of the vessel was justified by the provisions of Article 13 does not seem to be well founded. The Government of the United States has not thought it necessary in the discussion of this case to go into the question of the contraband or non-contraband character of the cargo. The Imperial German Government has admitted that this question makes no difference so far as its liability for damages is concerned, and the result is the same so far as the justification for the sinking of the vessel is concerned. As shown above, if we assume that the cargo was contraband, the master of the *Frye* should have been allowed to deliver it out, and the vessel should have been allowed to proceed on her voyage.

On the other hand, if we assume that the cargo was noncontraband, the destruction either of the cargo or the vessel could not be justified in the circumstances of this case under any accepted rule of interna-

tional law. Attention is also called to the provisions of Article 12 of the Treaty of 1785 between the United States and Prussia, which, like Article 13 of the Treaty of 1799, was continued in force by Article 12 of the Treaty of 1828. So far as the provisions of Article 12 of the Treaty of 1785 apply to the question under consideration, they are as follows:

"If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case, as in full peace the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other."

It seems clear to the Government of the United States, therefore, that whether the cargo of the *Fryc* is regarded as contraband or as non-contraband, the destruction of the vessel was, as stated in my previous communication on this subject, "a violation of the obligations imposed upon the Imperial German Government under existing treaty stipulations between the United States and Prussia."

For these reasons the Government of the United States must disagree with the contention which it understands is now made by the Imperial German Government that an American vessel carrying contraband may be destroyed without liability or accountability beyond the payment of such compensation for damages as may be fixed by a German Prize Court. The issue thus presented arises on a disputed interpretation of treaty provisions, the settlement of which requires direct diplomatic discussion between the two Governments, and can not properly be based upon the decision of the German Prize Court, which is in no way conclusive or binding upon the Government of the United States.

Moreover, even if no disputed question of treaty interpretation was involved, the admission by the Imperial German Government of its liability for damages for sinking the vessel would seem to make it unnecessary, so far as this claim is concerned, to ask the Prize Court to decide "whether the destruction of the ship and cargo was legal, and whether and under what conditions the property sunk was liable to confiscation," which, you state in your note dated June 7, are questions which should be decided by the Prize Court. In so far as these questions relate to the cargo, they are outside of the present discussion, because, as pointed out in my previous note to you on the subject dated April 30, "the claim under discussion does not include damages for the destruction of the cargo."

The real question between the two Governments is what reparation must be made for a breach of treaty obligations, and that is not a question which falls within the jurisdiction of a Prize Court.

In my first note on the subject the Government of the United States requested that "full reparation be made by the Imperial German Government for the destruction of the *William P. Frye*." Reparation necessarily includes an indemnity for the actual pecuniary loss sustained, and the Government of the United States takes this opportunity to assure the Imperial German Government that such an indemnity, if promptly paid, will be accepted as satisfactory reparation, but it does not rest with a Prize Court to determine what reparation should be made or what reparation would be satisfactory to the Government of the United States.

Your Excellency states in your note of June 7 that in the event the Prize Court should not grant indemnity in accordance with the treaty requirements, the German Government would not hesitate to arrange for equitable indemnity, but it is also necessary that the Government of the United States should be satisfied with the amount of the indemnity, and it would seem to be more appropriate and convenient that an arrangement for equitable indemnity should be agreed upon now rather than later. The decision of the Prize Court, even on the question of the amount of indemnity to be paid, would not be binding or conclusive on the Government of the United States.

The Government of the United States also dissents from the view expressed in your note that "there would be no foundation for a claim of the American Government unless the Prize Courts should not grant indemnity in accordance with the treaty." The claim presented by the American Government is for an indemnity for a violation of a treaty, in distinction from an indemnity in accordance with the treaty, and therefore is a matter for adjustment by direct diplomatic discussion between the two Governments and is in no way dependent upon the action of a German Prize Court.

For the reasons above stated the Government of the United States can not recognize the propriety of submitting the claim presented by it on behalf of the owners and captain of the *Frye* to the German Prize Court for settlement.

The Government of the United States is not concerned with any proceedings which the Imperial German Government may wish to take on "other claims of neutral and enemy interested parties" which have not been presented by the Government of the United States, but which you state in your note of June 7 make Prize Court proceedings in this case indispensable, and it does not perceive the necessity for postponing the settlement of the present claim pending the consideration of those other claims by the Prize Court.

The Government of the United States, therefore, suggests that the Imperial German Government reconsider the subject in the light of these considerations, and because of the objections against resorting to the Prize Court the Government of the United States renews its

former suggestion that an effort be made to settle this claim by direct diplomatic negotiations.

LANSING.

Ambassador Gerard to the Secretary of State

[Telegram]

No. 2656.]

AMERICAN EMBASSY,
Berlin, July 30, 1915.

Following note received:

FOREIGN OFFICE, *Berlin, July 30, 1915.*

The undersigned has the honor to inform His Excellency, Mr. James W. Gerard, Ambassador of the United States of America, in reply to the note of the 26th ultimo, Foreign Office No. 3990, on the subject of the sinking of the American merchant vessel *William P. Frye* by the German auxiliary cruiser *Prinz Eitel Friedrich,* that the points of view brought out in the note have been carefully examined by the Imperial German Government. This examination has led to the following conclusions:

The Government of the United States believes that it is incumbent upon it to take the position that the treaty rights to which America is entitled, as contained in Article 12 of the Prussian-American treaty of amity and commerce of September 10, 1785, in Article 13 of the Prussian-American treaty of amity and commerce of July 11, 1799, were violated by the sinking of the *William P. Frye.* It interprets these articles as meaning that a merchantman of the neutral contracting party carrying contraband can not in any circumstances be destroyed by a war-ship of the belligerent contracting party, and that the sinking of the *William P. Frye* was, therefore, in violation of the treaty, even if her cargo should have consisted of contraband, which it leaves outside of the discussion.

The German Government can not accept this view. It insists as heretofore that the commander of the German auxiliary cruiser acted in the legal exercise of the right of control of trade in contraband enjoyed by war-ships of belligerent nations, and that the treaty stipulations mentioned merely oblige the German Government to make compensation for the damage sustained by the American citizens concerned.

It is not disputed by the American Government that, according to general principles of international law, a belligerent is authorized in sinking neutral vessels under almost any conditions for carrying contraband. As is well known, these principles were laid down in Articles 49 and 50 of the Declaration of London, and were recognized at that time by the duly empowered delegates of all the nations which par-

ticipated in the conference, including the American delegates, to be declarative of existing international law (see preliminary clause of the Declaration of London); moreover, at the beginning of the present war, the American Government proposed to the belligerent nations to ratify the Declaration of London and give its provisions formal validity also.

The German Government has already explained in its note of April 4 last for what reasons it considers that the conditions justifying the sinking under international law were present in the case of the *William P. Frye*. The cargo consisted of conditional contraband, the destination of which for the hostile armed forces was to be presumed under the circumstances; no proof to overcome this presumption has been furnished. More than half the cargo of the vessel was contraband, so that the vessel was liable to confiscation. The attempt to bring the American vessel into a German port would have greatly imperiled the German vessel in the given situation of the war, and at any rate practically defeated the success of her further operations. Thus the authority for sinking the vessel was given according to general principles of international law.

There only remains then to be examined the question how far the Prussian-American treaty stipulations modify these principles of international law.

In this connection Article 12 of the treaty of 1785 provides that in the event of a war between one of the contracting parties with another power the free commerce and intercourse of the nationals of the party remaining neutral with the belligerent powers shall not be interrupted, but that on the contrary the vessel of the neutral party may navigate freely to and from the ports of the belligerent powers, even neutralizing enemy goods on board thereof. However, this article merely formulates general rules for the freedom of maritime intercourse and leaves the question of contraband untouched; the specific stipulations on this point are contained in the following article, which is materially identical with Article 13 of the treaty of 1799 now in force.

The plain intention of Article 13 is to establish a reasonable compromise between the military interests of the belligerent contracting party and the commercial interests of the neutral party. On the one hand the belligerent party is to have the right to prevent the transportation of war supplies to his adversaries even when carried on vessels of the neutral party; on the other hand the commerce and navigation of the neutral party is to be interfered with as little as possible by the measures necessary for such prevention, and reasonable compensation is to be paid for any inconvenience or damage which may nevertheless ensue from the proceeding of the belligerent party.

Article 13 recites the following means whereby the belligerent party can prevent the vessels of the neutral party from carrying war sup-

plies to his adversary. The detention of the ship and cargo for such length of time as the belligerent may think necessary; furthermore the taking over of the war stores for his own use, paying the full value of the same as ascertained at the place of destination. The right of sinking is not mentioned in the treaty and is therefore neither expressly permitted nor expressly prohibited, so that on this point the party stipulations must be supplemented by the general rules of international law. From the meaning and spirit of the treaty it really appears out of the question that it was intended to expect of the belligerent that he should permit a vessel loaded with contraband, for example a shipment of arms and ammunition of decisive importance for the outcome of the war, to proceed unhindered to his enemy when circumstances forbid the carrying of the vessel into port, if the general rules of international law allow sinking of the vessel.

The remaining stipulations of Article 13 must likewise be considered in this light; they provide that the captain of a vessel stopped shall be allowed to proceed on his voyage if he delivers out the contraband to the war-ship which stopped his vessel. For such delivering out can not of course be considered when the ensuing loss of time imperils either the war-ship herself or the success of her other operations. In the case of the *William P. Frye* the German commander at first tried to have matters settled by the delivery of contraband, but convinced himself of the impracticability of this attempt in that it would expose his ship to attack by whatever superior force of enemy war vessels pursuing him and was accordingly obliged to determine upon the sinking of the *Frye*. Thus he did not exceed on this point the limits to which he was bound by Article 13.

However, Article 13 asserts itself here to the extent that it founds the obligation to compensate the American citizens affected, whereas according to the general rules of international law the belligerent party does not need to grant compensation for a vessel lawfully sunk. For if, by Article 13, the mere exercise of right of highways makes the belligerent liable for compensation. this must apply *a fortiori* to the exercise of the right of sinking.

The question whether the German commander acted legally was primarily a subject for the consideration of the German prize courts according to general principles of international law as laid down; also in Article 1 of The Hague Convention for the establishment of an international prize court and in Article 51 of the Declaration of London. The German Government consequently laid the case of *William P. Frye* before the competent prize court at Hamburg, as was stated in its note of the 7th ultimo. This court found by its judgment of the 10th instant that the cargo of the American vessel *William P. Frye* was contraband, that the vessel could not be carried into port, and that the sinking was therefore justified; at the same time the court expressly recognized the validity of the Prussian-American

treaty stipulations severally mentioned for the relations between the German Empire and America, so that the sinking of the ship and cargo, so far as American property, makes the German Empire liable for indemnity. The prize court was unable to fix the indemnity itself, since it had no data before it, failing the receipt of the necessary detail from the parties interested.

It will now be necessary to settle these points in a different way. The German Government suggests as the simplest way that each of the two Governments designate an expert, and that the two experts jointly fix the amount of indemnity for the vessel and any American property which may have been sunk with her. The German Government will promptly pay the amount of indemnity thus ascertained; it expressly declares, however, reverting to what has been stated above, that this payment does not constitute satisfaction for the violation of American treaty rights, but a duty or policy of this Government founded on the existing treaty stipulations.

Should the American Government not agree to this manner of settling the matter, the German Government is prepared to submit the difference of opinion as being a question of the interpretation of the existing treaties between Germany and the United States to the tribunal at The Hague, pursuant to Article 38 of The Hague Convention for the pacific settlement of international disputes.

The undersigned begs to suggest that the Ambassador bring the above to the attention of his Government and avails himself, etc.,

VON JAGOW.

GERARD.

The Secretary of State to Ambassador Gerard

[Telegram]

No. 2057.] DEPARTMENT OF STATE,
Washington. August 10, 1915.

You are instructed to present the following note to the German Minister for Foreign Affairs:

Under instructions from my Government, I have the honor to inform Your Excellency in reply to your note of July 30 in regard to the claim for reparation for the sinking of the *William P. Frye,* that the Government of the United States learns with regret that the objections urged by it against the submission of this case to the prize court for decision have not commended themselves to the Imperial German Government, and it equally regrets that the reasons presented by the Imperial German Government for submitting this case to the prize court have failed to remove the objections of the Government of the

United States to the adoption of that course. As this disagreement has been reached after the full presentation of the views of both Governments in our previous correspondence, a further exchange of views on the questions in dispute would doubtless be unprofitable, and the Government of the United States therefore welcomes Your Excellency's suggestion that some other way should be found for settling this case.

The two methods of settlement proposed as alternative suggestions in Your Excellency's note have been given careful consideration, and it is believed that if they can be combined so that they may both be adopted, they will furnish a satisfactory basis for the solution of the questions at issue.

The Government of the United States has already expressed its desire that the question of the amount of indemnity to be paid by the Imperial German Government under its admitted liability for the losses of the owners and captain on account of the destruction of the *Frye* should be settled by diplomatic negotiation, and it entirely concurs with the suggestion of the Imperial German Government that the simplest way would be to agree, as proposed in your note, "that each of the two Governments designate an expert and that the two experts jointly fix the amount of indemnity for the vessel and any American property which may have been sunk with her," to be paid by the Imperial German Government when ascertained as stated in your note. It is assumed that the arrangement will include some provision for calling in an umpire in case the experts fail to agree.

The Government of the United States notes that your suggestion is made with the express reservation that a payment under this arrangement would not constitute an admission that American treaty rights had been violated, but would be regarded by the Imperial German Government merely as fulfilling a duty or policy founded on existing treaty stipulations. A payment made on this understanding would be entirely acceptable to the Government of the United States, provided that the acceptance of such payment should likewise be understood to be without prejudice to the contention of the Government of the United States that the sinking of the *Frye* was without legal justification, and provided also that an arrangement can be agreed upon for the immediate submission to arbitration of the question of legal justification, in so far as it involves the interpretation of existing treaty stipulations.

There can be no difference of opinion between the two Governments as to the desirability of having this question of the true intent and meaning of their treaty stipulations determined without delay, and to that end the Government of the United States proposes that the alternative suggestion of the Imperial German Government also be adopted, so that this question of treaty interpretation can be submitted forth-

with to arbitration pursuant to Article 38 of The Hague Convention for the pacific settlement of international disputes.

In this way both the question of indemnity and the question of treaty interpretation can promptly be settled, and it will be observed that the only change made in the plan proposed by the Imperial German Government is that instead of eliminating either one of its alternative suggestions, they are both given effect in order that both of the questions under discussion may be dealt with at the same time.

If this proposal proves acceptable to the Imperial German Government, it will be necessary also to determine whether, pending the arbitral award, the Imperial German Government shall govern its naval operations in accordance with its own interpretation, or in accordance with the interpretation maintained by the United States, as to the obligations imposed by their treaty stipulations, and the Government of the United States would be glad to have an expression of the views of the Imperial German Government on this point.

LANSING.

Ambassador Gerard to the Secretary of State

[Telegram]

AMERICAN EMBASSY,
Berlin, September 20, 1915.

Following note received from the Foreign Office to-day:

FOREIGN OFFICE,
Berlin, September 19, 1915.

The undersigned has the honor to make the following reply to the note of His Excellency, Mr. James W. Gerard, Ambassador of the United States of America, dated 13th ultimo, on the subject of the claim for reparation for the sinking of the American merchantman *William P. Frye*.

With regard first to the ascertainment of the damages by experts the German Government believes that it should dispense with the nomination of an umpire. In the cases of the ascertainment of damages hitherto arranged between the German Government and a neutral Government from similar causes the experts named by the two parties have always reached an agreement as to the amount of the damage without difficulty; should it not be possible, however, to reach an agreement on some point, it could probably be settled by diplomatic negotiation. Assuming that the American Government agrees to this, the German Government names as its expert Dr. Kepny, of Bremen, director of the North German Lloyds; it begs to await the designation of the American expert.

The German Government declares that it agrees to the proposal of the American Government to separate the question of indemnity from the question of the interpretation of the Prussian-American treaties of 1785, 1799, and 1828. It therefore again expressly states that in making payment it does not acknowledge the violation of the treaty as contended by the American side, but it will admit that the settlement of the question of indemnity does not prejudice the arrangement of the difference of opinion concerning the interpretation of the treaty rights, and that this dispute is left to be decided by The Hague tribunal of arbitration.

The negotiations relative to the signing of the *compromis* provided by Article 52 of The Hague Arbitration Convention would best be conducted between the Foreign Office and the American Embassy in Berlin in view of the difficulties in the way of instructing the Imperial Ambassador at Washington. In case the American Government agrees, the Foreign Office is prepared to submit to the Embassy a draft of such a *compromis*.

The American Government's inquiry whether the German Government will govern its naval operations in accordance with the German or American interpretation of the treaty stipulations in question pending the arbitral proceedings has been carefully considered by German Government. From the standpoint of law and equity it is not prevented in its opinion from proceeding against American ships carrying contraband according to its interpretation until the question is settled by arbitration. For the German Government does not need to depart from the application of generally recognized rules of the law of maritime war, as the Declaration of London, unless and in so far as an exception based on a treaty, is established beyond all doubt; in the case of the present difference of opinion between the German and the American Governments such an exception could not be taken to be established except on the ground of the arbitral award. Moreover, the disadvantages to Germany which would ensue from the American interpretation of the treaty stipulations would be so much greater as to be out of proportion to those which the German interpretation would entail for the United States. For whereas the American interpretation would materially impede Germany in her conduct of warfare, hardly any particular disadvantage to American citizens would result from the German interpretation, since they receive full reparation for any property damage sustained.

Nevertheless the German Government, in order to furnish to the American Government evidence of its conciliatory attitude, has issued orders to the German naval forces not to destroy American merchantmen which have loaded conditional contraband, even when the conditions of international law are present, but to permit them to continue their voyage unhindered if it is not possible to take them into port. On the other hand, it must reserve to itself the right to destroy vessels

carrying absolute contraband wherever such destruction is permissible according to the provisions of the Declaration of London.

The undersigned begs to suggest that the Ambassador bring the above to the knowledge of his Government, and avails himself of the opportunity to renew, etc.

VON JAGOW.

GERARD.

The Secretary of State to Ambassador Gerard

[Telegram]

DEPARTMENT OF STATE,
Washington, October 12, 1915.

You are instructed to present the following note to the German Minister of Foreign Affairs:

In reply to Your Excellency's note of September 19, on the subject of the claim for damages for the sinking of the American merchantman *William P. Frye*, I am instructed by the Government of the United States to say that it notes with satisfaction the willingness of the Imperial German Government to settle the questions at issue in this case by referring to a joint commission of experts the amount of the indemnity to be paid by the Imperial German Government under its admitted liability for the losses of the owners and captain on account of the destruction of the vessel, and by referring to arbitration the question of the interpretation of treaty rights. The Government of the United States further notes that in agreeing to this arrangement the Imperial German Government expressly states that in making payment it does not acknowledge the violation of the treaty as contended by the Government of the United States, and that the settlement of the question of indemnity does not prejudice the arrangement of the differences of opinion between the two governments concerning the interpretation of the treaty rights. The Government of the United States understands that this arrangement will also be without prejudice to its own contention in accordance with the statement of its position in its note of August 10 last to Your Excellency on this subject, and the Government of the United States agrees to this arrangement on that understanding. Your Excellency states that the Imperial German Government believes that the nomination of an umpire should be dispensed with, because it has been the experience of the Imperial German Government that the experts named in such cases have always reached an agreement without difficulty, and that should they disagree on some point, it could probably be settled by diplomatic negotiation. The

Government of the United States entirely concurs in the view that it is not necessary to nominate an umpire in advance. It is not to be assumed that the experts will be unable to agree, or that if they are, the point in dispute can not be settled by diplomatic negotiation, but the Government of the United States believes that in agreeing to this arrangement it should be understood in advance that in case the amount of indemnity is not settled by the joint commission of experts or by diplomatic negotiation, the question will then be referred to an umpire if that is desired by the Government of the United States.

Assuming that this understanding is acceptable to the German Government, it will only remain for the Government of the United States to nominate its expert to act with the expert already nominated by the German Government on the joint commission. It seems desirable to the Government of the United States that this joint commission of experts should meet without delay as soon as the American member is named and that its meetings should be held in the United States, because, as pointed out in my note to you of April 30 last, any evidence which the German Government may wish to have produced is more acceptable and can more conveniently be examined there than elsewhere.

With reference to the agreement to submit to arbitration the question of treaty interpretation, the Government of the United States notes that in answer to its inquiry whether, pending the arbitral proceedings, the German Government will govern its naval operations in accordance with the German or American interpretation of the treaty stipulations in question, the reply of the German Government is that it "has issued orders to the German naval forces not to destroy American merchantmen which have loaded conditional contraband even when the conditions of international law are present, but to permit them to continue their voyage unhindered if it is not possible to take them into port," and that "on the other hand it must reserve to itself the right to destroy vessels carrying absolute contraband whenever such destruction is permissible according to the provisions of the Declaration of London."

Without admitting that the Declaration of London is in force, and on the understanding that the requirement in Article 50 of the Declaration that "before the vessel is destroyed all persons on board must be placed in safety" is not satisfied by merely giving them an opportunity to escape in lifeboats, the Government of the United States is willing, pending the arbitral award in this case, to accept the Declaration of London as the rule governing the conduct of the German Government in relation to the treatment of American vessels carrying cargoes of absolute contraband. On this understanding the Government of the United States agrees to refer to arbitration this question of treaty interpretation.

The Government of the United States concurs in the desire of the Imperial German Government that the negotiations relative to the signing of the compromise referring this question of treaty interpreta-

tion to arbitration under the provisions of Article 52 of The Hague Arbitration Convention, should be conducted between the German Foreign Office and the American Embassy in Berlin, and the Government of the United States will be glad to receive the draft compromise, which you inform me the Foreign Office is prepared to submit to the American Ambassador in Berlin. Anticipating that it may be convenient for the Imperial German Government to know in advance of these negotiations the preference of the Government of the United States as to the form of arbitration to be arranged for in the compromise, my Government desires me to say that it would prefer, if agreeable to the Imperial Government, that the arbitration should be by summary procedure, based upon the provisions of Articles 86 to 90, inclusive, of The Hague Arbitration Convention, rather than the longer form of arbitration before the Permanent Court at The Hague.

Arrange for simultaneous publication of this note at earliest date which will give you time to notify the Department.

LANSING.

Ambassador Gerard to the Secretary of State

No. 1964.] AMERICAN EMBASSY,
Berlin, December 2, 1915.

SIR: With reference to my telegram of even date[1] and to previous correspondence on the subject of the claim for damages for the sinking of the American merchantman *William P. Frye,* I have the honor to transmit to you herewith a copy and translation of a note received from the Imperial Foreign Office, dated November 29, 1915, which replies to a note which I addressed to the Imperial Foreign Office on October 14, 1915, pursuant to the instructions contained in your telegram No. 2291, of October 12, 1915.

A copy and translation of the draft of a *compromis* submitted by the Imperial German Government is likewise transmitted herewith.

I have, etc.,

GERARD.

[Inclosure—Translation]

The German Minister for Foreign Affairs to Ambassador Gerard

BERLIN, *November 29, 1915.*

The undersigned has the honor to inform His Excellency, Mr. James W. Gerard, Ambassador of the United States of America, in reply to

[1]Not printed.

the note of October 14, F. O. No. 5671, relative to indemnity for the sinking of the American merchant vessel *William P. Frye,* as well as to the settlement by arbitration of the difference of opinion which has arisen on this occasion, as follows:

With regard first to the ascertainment of indemnity for the vessel sunk, the German Government is in agreement with the American Government in principle that the amount of damages be fixed by two experts, one each to be nominated by the German and the American Governments. The German Government regrets that it can not comply with the wish of the American Government to have the experts meet in Washington, since the expert nominated by it, Dr. Greve, of Bremen, director of the North German Lloyd, is unable to get away from here, and furthermore would be exposed to the danger of capture during a voyage to America in consequence of the conduct of maritime war by England contrary to international law. Should the American expert likewise be unable to get away, the two experts might perhaps get in touch with each other by correspondence.

The German Government likewise regrets that it can not assent at this time to the nomination of an umpire as desired by the American Government, for apart from the fact that in all probability the experts will reach an agreement in the case of the *William P. Frye* with the same facility as was the case with similar negotiations with other neutral Governments, the assent of the German Government to the consultation of an umpire would depend materially upon whether the differences of opinion between the two experts pertained to questions of principle or merely to the appraisement of certain articles. The consultation of an umpire could only be considered at all in the case of appraisements of this nature.

Should the American Government insist on its demands for the meeting of the experts at Washington or the early choice of an umpire, the only alternative would be to arrange the fixing of damages by diplomatic negotiation. In such an event the German Government begs to await the transmission of a statement of particulars of the various claims for damages accompanied by the necessary proofs.

With regard to the arbitral treatment of the difference of opinion relative to the interpretation of certain stipulations of the Prussian-American commercial treaties, the German Government has drawn up the inclosed draft of a *compromis*, which would have to be worded in the German and English languages and drawn up with due consideration of the two alternating texts. It is true that the draft does not accommodate the suggestions of the American Government so far as it is not in accordance with the rules of summary procedure provided by chapter 4 of The Hague Arbitration Convention, but with the rules of regular procedure. The summary procedure is naturally intended only for differences of opinion of inferior importance, whereas the German Government attaches very particular importance to the interpretation of the Prussian-American treaties which have existed

for over 100 years. Pursuant to the agreement made, any proposed amendments would have to be discussed between the Foreign Office and the American Embassy, and oral discussions would appear to be advisable.

Until the decision of the permanent court of arbitration, the German naval forces will sink only such American vessels as are loaded with absolute contraband, when the preconditions provided by the Declaration of London are present. In this the German Government quite shares the view of the American Government that all possible care must be taken for the security of the crew and passengers of a vessel to be sunk. Consequently, the persons found on board of a vessel may not be ordered into her lifeboats except when the general conditions, that is to say, the weather, the condition of the sea, and the neighborhood of the coasts afford absolute certainty that the boats will reach the nearest port. For the rest the German Government begs to point out that in cases where German naval forces have sunk neutral vessels for carrying contraband, no loss of life has yet occurred.

The undersigned begs to give expression to the hope that it will be possible for the two Governments to reach a complete understanding regarding the case of the *William P. Frye* on the above basis, and avails himself of this opportunity to renew to His Excellency, the Ambassador, the assurance of his highest consideration.

VON JAGOW.

[Translation]

ARBITRATION COMPROMIS

The Imperial German Government and the Government of the United States of America having reached an agreement to submit to a court of arbitration the difference of opinion which has arisen, occasioned by the sinking of the American merchant vessel *William P. Frye* by a German war-ship, in respect of the interpretation of certain stipulations of the Prussian-American treaties of amity and commerce, the undersigned, duly authorized for this purpose, have agreed to the following *compromis:*

ARTICLE I

A court of arbitration composed in accordance with the following stipulations is charged with the decision of the legal question:

Whether according to the treaties existing between the parties, in particular Article XIII of the Prussian-American treaty of amity and commerce of July 11, 1799, the belligerent contracting party is prevented from sinking merchant vessels of the neutral contracting party for carrying contraband when such sinking is permissible according to general principles of international law.

ARTICLE II

The court of arbitration shall be composed of five arbitrators to be chosen among the members of the permanent tribunal of arbitration at The Hague.

Each government will choose two arbitrators, of whom only one may be a national of such country, as soon as possible, at the latest within two weeks from the day this *compromis* is signed. The four arbitrators thus nominated shall choose an umpire within four weeks after they have been notified of their nomination; in case of an equal vote the president of the Swiss federal council shall be requested to select the umpire.

ARTICLE III

On March 1, 1916, each party shall transmit to the bureau of the permanent tribunal of arbitration 18 copies of its argument with authenticated copies of all documents and correspondence on which it intends to rely in the case. The bureau will arrange without delay for the transmission to the arbitrators and to the parties, each arbitrator to receive two copies, each party three copies. Two copies shall remain in the archives of the bureau.

On May 1, 1916, the parties shall deposit their countercases with the supporting evidence and their statements in conclusion.

ARTICLE IV

Each party shall deposit with the international bureau at the latest on March 1, 1916, the sum of 3,000 gulden of The Netherlands toward the costs of the arbitral procedure.

ARTICLE V

The court of arbitration shall meet at The Hague on June 15, 1916, and proceed immediately to examine the dispute.

ARTICLE VI

The parties may make use of the German or the English language. The members of the court may use the German or the English language as they may choose. The decisions of the court shall be written in both languages.

ARTICLE VII

Each party shall be represented by a special agent whose duty shall be to act as an intermediary between the party and the court. These agents shall furnish the court any explanations which the court may

demand of them; they may submit any legal arguments which they may consider advisable for the defense of their case.

Article VIII

The stipulations of the convention of October 18, 1907, for the pacific settlement of international disputes, shall be applied to this arbitral procedure, in so far as nothing to the contrary is provided by the above *compromis*.

Done in duplicate at Berlin on the —— day of ——

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Supplement to Pamphlet No. 26[1]

The Minister of Switzerland in Charge of German Interests in America to the Secretary of State

LEGATION OF SWITZERLAND,
Washington, February 10, 1917.

MR. SECRETARY OF STATE: The German Legation at Berne has communicated the following to the Swiss Political Department (Foreign Office):

> The American treaty of friendship and commerce of the eleventh of July, 1799, provides by Article 23 for the treatment of the subjects or citizens of the two States and their property in the event of war between the two States. This Article, which is without question in full force as regards the relations between the German Empire and the United States, requires certain explanations and additions on account of the development of international law. The German Government therefore proposes that a special arrangement be now signed, of which the English text is as follows:
>
> *Agreement* between Germany and the United States of America concerning the treatment of each others citizens and their private property after the severance of diplomatic relations.
>
> *Article 1*). After the severance of diplomatic relations between Germany and the United States of America and in the event of the outbreak of war between the two powers, the citizens of either party and their private property in the territory of the other party shall be treated according to article 23 of the treaty of amity and commerce between Prussia and the United States, of the 11th of July, 1799, with the following explanatory and supplementary clauses:
>
> *Article 2*). German merchants in the United States and American merchants in Germany shall, so far as the treatment of their persons and their property is concerned, be held in every respect on a par with the other persons mentioned in article 23. They shall accordingly, even after the period provided for in article 23 has elapsed, be entitled to remain and continue their profession in the country of their residence. Merchants as well as the other persons mentioned in article 23 may be excluded from fortified places or other places of military importance.

[1]Official Prints of the Department of State.

Article 3). Germans in the United States and Americans in Germany shall be free to leave the country of their residence within the time and by the routes that shall be assured to them by the proper authorities. The persons departing shall be entitled to take along their personal property, including money, valuables, and bank accounts, excepting such property the exportation of which is prohibited according to general provisions.

Article 4). The protection of Germans in the United States and of Americans in Germany and of their property shall be guaranteed in accordance with the laws existing in the countries of either party. They shall be under no other restrictions concerning the enjoyment of their private rights and the judicial enforcement of their rights than neutral residents. They may accordingly not be transferred to concentration camps, nor shall their private property be subject to sequestration or liquidation or other compulsory alienation except in case that under the existing laws apply also to neutrals. As a general rule German property in the United States and American property in Germany shall not be subject to sequestration or liquidation, or other compulsory alienation under other conditions than neutral property.

Article 5). Patent rights or other protected rights held by Germans in the United States or Americans in Germany shall not be declared void, nor shall the exercise of such rights be impeded, nor shall such rights be transferred to others without the consent of the person entitled thereto, provided that regulations made exclusively in the interest of the State shall apply.

Article 6). Contracts made between Germans and Americans, either before or after the severance of diplomatic relations, also obligations of all kinds between Germans and Americans, shall not be declared cancelled, void, or in suspension, except under provisions applicable to neutrals. Likewise the citizens of either party shall not be impeded in fulfilling their liabilities arising from such obligations, either by injunctions or by other provisions, unless these apply to neutrals.

Article 7). The provisions of the sixth Hague Convention, relative to the treatment of enemy merchant ships at the outbreak of hostilities, shall apply to the merchant vessels of either party and their cargo. The aforesaid ships may not be forced to leave port unless at the same time they be given a pass, recognized as binding by all the enemy sea powers, to a home port, or a port of an allied country, or to another port of the country in which the ship happens to be.

Article 8). The regulations of chapter 3 of the eleventh Hague Convention, relative to certain restrictions in the exercise of the right of capture in maritime war, shall apply to the captains, officers, and members of the crews of merchant ships specified in article 7, and of such merchant ships as may be captured in the course of a possible war.

Article 9). This agreement shall apply also to the colonies and other foreign possessions of either party.

I am instructed and have the honor to bring the foregoing to your Excellency's knowledge and to add that the German Government would consider the arrangement as concluded and act accordingly as soon as the consent of the American Government shall have been communicated to it through the Swiss Government.

Be pleased, etc.,

P. RITTER.

The Secretary of State to the Minister of Switzerland in Charge of German Interests in America

No. 416.] DEPARTMENT OF STATE,
Washington, March 20, 1917.

SIR: I beg to acknowledge the receipt of your note of February 10th presenting the proposals of the German Government for an interpretative and supplementary agreement as to Article 23 of the Treaty of 1799. After due consideration, I have to inform you that the Government of the United States is not disposed to look with favor upon the proposed agreement to alter or supplement the meaning of Article 23 of this Treaty. This position of the Government of the United States, which might under other conditions be different, is due to the repeated violations by Germany of the Treaty of 1828 and the Articles of the Treaties of 1785 and 1799 revived by the Treaty of 1828. It is not necessary to narrate in detail these violations, for the attention of the German Government has been called to the circumstances of each instance of violation, but I may here refer to certain of them briefly and in general terms.

Since the sinking of the American steamer *William P. Frye* for the carriage of contraband, there have been perpetrated by the German naval forces similar unwarranted attacks upon and destruction of numerous American vessels for the reason, as alleged, that they were engaged in transportation of articles of contraband, notwithstanding, and in disregard of, Article 13 of the Treaty of 1799, that "No such articles (of contraband) carried in the vessels or by the subjects or citizens of either party to the enemies of the other shall be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals," and that "In the case * * * of a vessel stopped for articles of contraband, if the master of the vessel stopped

will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port or further detained, but shall be allowed to proceed on her voyage."

In addition to the sinking of American vessels, foreign merchant vessels carrying American citizens and American property have been sunk by German submarines without warning and without any adequate security for the safety of the persons on board or compensation for the destruction of the property by such action, notwithstanding the solemn engagement of Article 15 of the Treaty of 1799 that "All persons belonging to any vessel of war, public or private, who shall molest or insult in any manner whatever the people, vessels or effects of the other party, shall be responsible in their persons and property for damages and interest, sufficient security for which shall be given by all commanders of private armed vessels before they are commissioned," and notwithstanding the further stipulation of Article 12 of the Treaty of 1785 that "The free intercourse and commerce of the subjects or citizens of the party remaining neutral with the belligerent powers shall not be interrupted." Disregarding these obligations, the German Government has proclaimed certain zones of the high seas in which it declared without reservation that all ships, including those of neutrals, will be sunk, and in those zones German submarines have, in fact, in accordance with this declaration, ruthlessly sunk merchant vessels and jeopardized or destroyed the lives of American citizens on board.

Moreover, since the severance of relations between the United States and Germany, certain American citizens in Germany have been prevented from removing freely from the country. While this is not a violation of the terms of the treaties mentioned, it is a disregard of the reciprocal liberty of intercourse between the two countries in time of peace, and can not be taken otherwise than as an indication of a purpose on the part of the German Government to disregard in the event of war the similar liberty of action provided for in Article 23 of the Treaty of 1799—the very article which it is now proposed to interpret and supplement almost wholly in the interest of the large number of German subjects residing in the United States and enjoying in their persons or property the protection of the United States Government. This article provides in effect that merchants of either country residing in the other shall be allowed a stated time in which to remain to settle their affairs and to "depart freely, carrying off all of their effects with-

out molestation or hindrance," and women and children, artisans and certain others, may continue their respective employments and shall not be molested in their persons or property. It is now proposed by the Imperial German Government to enlarge the scope of this article so as to grant to German subjects and German property remaining in the United States in time of war the same treatment in many respects as that enjoyed by neutral subjects and neutral property in the United States.

In view of the clear violations by the German authorities of the plain terms of the treaties in question, solemnly concluded on the mutual understanding that the obligations thereunder would be faithfully kept, in view further of the disregard of the canons of international courtesy and the comity of nations in the treatment of innocent American citizens in Germany, the Government of the United States can not perceive any advantage which would flow from further engagements, even though they were merely declaratory of international law, entered into with the Imperial German Government in regard to the meaning of any of the articles of these treaties, or as supplementary to them. In these circumstances, therefore, the Government of the United States declines to enter into the special protocol proposed by the Imperial Government.

I feel constrained in view of the circumstances to add that this Government is seriously considering whether or not the Treaty of 1828 and the revived articles of the treaties of 1785 and 1799 have not been in effect abrogated by the German Government's flagrant violations of their provisions, for it would be manifestly unjust and inequitable to require one party to an agreement to observe its stipulations and to permit the other party to disregard them. It would appear that the mutuality of the undertaking has been destroyed by the conduct of the German authorities.

Accept, etc.,

ROBERT LANSING.